No. 84-262

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

v.

PUEBLO OF SANTA ANA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF *AMICUS CURIAE* OF THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY IN SUPPORT OF THE BRIEF OF THE PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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INTEREST OF THE AMICUS CURIAE

The Atchison, Topeka and Santa Fe Railway Company ("AT&SF") is a rail carrier operating an interstate railroad system subject to the jurisdiction of the Interstate Commerce Commission under the Revised Interstate Commerce Act, 49 U.S.C. §§ 10101-11917 (Supp. 1984).[1] AT&SF's system provides interstate rail transportation service over approximately 12,000 miles of track in 12 states. AT&SF is the only railroad serving the major New Mexico cities of Albuquerque, Santa Fe, Las Cruces and Roswell, as well as the Sandia National Laboratory and Kirtland Air Force Base, and is the only railroad in the northwest portion of the state. AT&SF also provides the most direct rail link between Denver, Colorado, and El Paso, Texas, and between Kansas City, Missouri, and Los Angeles, California.

[1] Pursuant to Rule 36 of the Rules of the Supreme Court of the United States (1980), AT&SF's brief *amicus curiae* is being filed with the written consent of the parties to the case.

In New Mexico, AT&SF's system operates over rights-of-way across lands of seven Pueblos occupying substantial portions of central New Mexico: the Pueblo of Santa Ana, the Pueblo of San Felipe, the Pueblo of Sandia, the Pueblo of Isleta, the Pueblo de Santo Domingo, the Pueblo de Acoma and the Pueblo of Laguna. These Pueblos are located south, west, and north of Albuquerque, and their lands straddle the middle Rio Grande valley and the main transportation corridors of the state. Without rights-of-way across these Pueblos, AT&SF would not have a continuous north-south or east-west system and could no longer operate as one of the Nation's transcontinental rail carriers.

The decisions below threaten invalidation of those portions of AT&SF's rights-of-way across Pueblo lands obtained pursuant to Section 17 of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636 ("§ 17"). Invalidation could destroy the continuity of AT&SF's system and the service it provides. Consequently, these decisions threaten a primary goal of the Revised Interstate Commerce Act: to "insure the development and continuation of a sound rail transportation system . . ." 49 U.S.C. § 10101(a) (Supp. 1984).

The decisions below could force interruption of AT&SF's service and interfere with transportation and commerce in the Southwest. To date, the Pueblos of Isleta and Acoma have sued to eject AT&SF from their lands based upon the District Court decision. Further, replacement of rights-of-way lost in litigation could prove difficult or impossible because present Department of the Interior regulations require the consent of an Indian tribe or Pueblo to the granting or renewal of any right-of-way across its lands and empower it to withhold consent entirely. *See* 25 C.F.R. §§ 169.3(a), 169.19, 169.23(a) (1984); *see also Southern Pacific Transportation Co. v. Watt*, 700 F.2d 550 (9th Cir.), *cert. denied*, 104 S.Ct. 393 (1983). Consequently, AT&SF cannot be certain of being allowed to maintain its railroad facilities in their existing

locations on Pueblo lands. The practical and economic effect on AT&SF of being required to relocate its facilities, assuming such were feasible, are staggering. AT&SF would be required to acquire scores of miles of new rights-of-way and to construct new trackage at greatly increased right-of-way and construction cost. Because several of the Pueblos lie astride the Rio Grande valley between Santa Fe and Albuquerque, bordered by the Jemez mountains to the west and the Sandia mountains to the east, AT&SF could suffer the additional burden of having to construct over mountainous terrain and over a much longer route. During relocation, major New Mexico cities would be without rail service and one of the Nation's transcontinental rail routes would be disabled.

The current situation stems from the construction of AT&SF's system in New Mexico in the late 1880's when AT&SF and its corporate predecessor obtained rights-of-way across each of the Pueblos' lands. AT&SF, in reliance on the decision in *United States v. Joseph*, 94 U.S. 614 (1877), obtained these rights-of-way by negotiation or condemnation. Following the decision in *United States v. Sandoval*, 231 U.S. 28 (1913), and the enactment of the Pueblo Lands Act, AT&SF negotiated for and obtained the voluntary agreement of pertinent Pueblos to new rights-of-way that were approved by the Secretary of the Interior expressly acting pursuant to § 17. The Respondent, Pueblo of Santa Ana, granted to AT&SF an easement dated October 5, 1928, that subsequently was approved by the Secretary pursuant to § 17. Prior to the District Court's decision, AT&SF was aware of no question as to the validity of these approved rights-of-way.

AT&SF is also affected by the *res judicata* holdings of the courts below because AT&SF, like Mountain States Telephone and Telegraph Company ("Mountain Bell"), and the United States acting on behalf of pertinent Pueblos agreed to consent decrees in quiet title suits filed by the United States for Pueblos pursuant to Section 3 of the Pueblo Lands Act [App. 23a]. The orders of dismissal of

those suits, as to both AT&SF in numerous cases and Mountain Bell in this case, were entered pursuant to agreements between the United States attorney representing the Pueblos and counsel for the company that the quiet title suit would be dismissed if new rights-of-way were obtained from the Pueblo and approved by the Secretary under § 17.[2] The decisions below undermine the finality of consent judgments long relied upon by AT&SF.

STATUTORY PROVISIONS INVOLVED

Pueblo Lands Act of June 7, 1924, 43 Stat. 636 ("Pueblo Lands Act"). The full text of the Pueblo Lands Act is reproduced as Appendix C. [App. 22a-33a].

SUMMARY OF ARGUMENT

I. The Court of Appeals erred in discarding the agency interpretation of § 17 of the Pueblo Lands Act based solely upon the court's superficial examination of a portion of the statutory language. The courts below failed to recognize that the different terms employed in the two clauses of § 17 compel a full examination of all matters bearing on legislative intent. Principles traditionally insulating titles based upon administrative action from judicial invalidation were ignored, and the failure of the courts below to consider the purposes of the Pueblo Lands Act and prevailing contemporaneous notions respecting the validity of Pueblo conveyances mandate reversal of the Court of Appeal's decision. Finally, the courts below ignored this Court's decisions affirming a tribal power of alienation subject to the federal supervision designated in statutory restraints on alienation.

II. Policies of finality underlying the Pueblo Lands Act and the *res judicata* doctrine require that orders of dismissal entered in Pueblo Lands Act quiet title actions be given preclusive effect. Orders of dismissal entered by

[2] AT&SF also holds rights-of-way granted by Pueblos and approved under § 17 that were not subject to Pueblo Lands Act consent decrees because they were granted after the conclusion of such suits.

consent of the parties should be construed to effect the parties' intentions that Pueblo claims be finally resolved. In providing for quiet title actions before an equity court, Congress chose a procedure intended to ensure final resolution of the Pueblo land disputes. Finally, the many orders of dismissal entered in Pueblo Lands Act quiet title suits that affirm the validity of § 17 rights-of-way establish a rule of property no longer subject to judicial reconsideration.

ARGUMENT

I. THE TENTH CIRCUIT ERRED IN INVALIDATING TITLES WHICH ARE BASED UPON AN ADMINISTRATIVE INTERPRETATION CONSISTENT BOTH WITH THE LANGUAGE AND PURPOSE OF THE PUEBLO LANDS ACT AND WITH POLICIES UNDERLYING FEDERAL RESTRAINTS ON ALIENATION.

The fundamental flaw in the Tenth Circuit opinion is its conclusion that § 17 unambiguously imposed the condition of subsequent congressional enactment of statutory authority upon the validity of Pueblo conveyances approved by the Secretary of the Interior; therefore, the court held it could invalidate numerous long-established rights-of-way without according any deference to the contemporaneous administrative interpretation of the provision. [App. 7-9]. The Court of Appeals erred in discarding the agency construction of § 17 in favor of its own superficial interpretation of a portion of the statutory language. The decisions below did not address critical matters that traditionally insulate titles resting upon administrative action from judicial invalidation—the long passage of time, prevailing contemporaneous notions respecting the validity of Pueblo and tribal conveyances, and reasonable reliance by grantees. The courts below disregarded Chief Justice Marshall's admonition that: "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived." *United States v. Fisher*, 6 U.S. (2 Cranch)

358, 386 (1805). The Tenth Circuit erred because the different terms employed in the two clauses of § 17 compelled a full examination of all matters bearing on legislative intent and deference to an administrative interpretation having a reasonable basis in the language and purpose of the Pueblo Lands Act.

A. The Administrative Interpretation, Because It Established Now Long-Standing Titles, Is Conclusive If Reasonable.

The decision below erred in according no deference to the administrative interpretation undisputedly applied by the Secretary of the Interior; that agency interpretation was entitled to exceptional deference because it forms the basis for scores of long-standing titles to rights-of-way. Those rights-of-way have been relied upon for over 50 years by AT&SF, other grantes, and third parties in the establishment of patterns of transportation and commerce in New Mexico. Therefore, the rule stated by Justice Field in *United States v. The Burlington & Missouri River Railroad Co.*, 98 U.S. 334, 341 (1879), is controlling because "uniform" administrative action forms the basis for the land titles invalidated: "This uniform action is as potential, and as conclusive of the soundness of the construction, as if it had been declared by judicial decision. It cannot at this day be called in question."

As applied to the Interior Department's interpretation of § 17, this principle is particularly compelling. The Department of the Interior interpreted the second clause of § 17 as confirming its authority to approve rights-of-way voluntarily granted by a Pueblo as a community. Beginning in April, 1926, the Department of the Interior began approving rights-of-way pursuant to § 17. [J.A. 114-15]. Each of the 60 rights-of-way granted pursuant to § 17 across lands of the Pueblos, including the Pueblo of Santa Ana, now administered by the Southern Pueblos Agency of the Bureau of Indian Affairs ("BIA") was approved at the level of Secretary or Assistant Secretary of the

Interior [J.A. 114].[3] The Court of Appeals did not dispute that the Secretary's approval of at least 60 rights-of-way spanning a period of nearly 30 years constituted both a contemporaneous and a long-standing interpretation.

The administrative interpretation is entitled to still greater deference because both Interior Department and Pueblo representatives participated in the legislative process. *See Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers*, 367 U.S. 396, 308 (1961). Significantly, Pueblo members and their lawyers, citizens representing Pueblo interests, and Commissioner of Indian Affairs, Charles Burke, participated vigorously in the formulation of the Pueblo Lands Act. *See* Hearings on S. 3865 and S. 4223 Before a Senate Subcommittee of the Committee on Public Lands and Surveys, 67th Cong., 4th Sess. (1923) ("Senate Hearings"); Hearings on H.R. 13452 and H.R. 13674 Before the House of Representatives Committee on Indian Affairs, 67th Cong., 4th Sess. (1924) ("House Hearings"); *see also* L. Kelly, *The Assault on Assimilation, John Collier and the Origins of Indian Policy Reform* 255-93 (1983). The Pueblos thereafter affirmed the administrative construction by making each conveyance.

This Court's decisions require that exceptional deference be accorded administrative interpretations supporting titles to real property in recognition of expected reliance by grantees and third parties.[4] As stated in *McLaren v. Fleischer*, 256 U.S. 477, 480-81 (1921), judicial review of such interpretations is strictly limited:

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[3] The record in the District Court did not address the number of rights-of-way approved pursuant to § 17 across lands of the eight Pueblos now administered by the Northern Pueblos Agency, BIA.

[4] Doctrines restricting judicial intrusion into settled matters, such as the *res judicata* doctrine, "are at their zenith in cases concerning real property, land and water . . .", *Nevada v. United States*,

> In the practical administration of the act the officers of the Land Department have adopted and given effect to the [challenged] view . . . Many outstanding titles are based upon it and much can be said in support of it. If not the only reasonable construction of the act, it is at least an admissible one. It therefore comes within the rule that the practical construction given to an act of Congress, fairly susceptible of different constructions, by those charged with the duty of executing it is entitled to great respect and, if acted upon for a number of years will not be disturbed except for cogent reasons.

A long-standing and reasonable interpretation supporting titles was held to be "conclusive" in *United States v. The Burlington & Missouri River Railroad Co.*, 98 U.S. 334, 341 (1879), because reliance upon the interpretation had taken many forms: "Patents have been issued, bonds given, mortgages executed, and legislation had upon the construction." *See also Andrus v. Shell Oil Co.*, 446 U.S. 657, 667-68 (1980); *cf. United States v. State Bank of North Carolina*, 31 U.S. (6 Pet.) 28, 39 (1832). Interior Department interpretations of its authority to grant or approve conveyances of interests in real property are entitled to special deference because, as in *Udall v. Tallman*, 380 U.S. at 18, the administrative action contemplates the real property being "developed, at very great expense, in reliance upon the Secretary's interpretation." The Tenth Circuit disregarded that doctrines that protect reliance upon long-standing titles apply with full force to actions brought by Indian tribes. *See Nevada v. United States*, 103 S. Ct. at 2923-24.

Reliance upon the administrative interpretation has been substantial. AT&SF has relied upon it in maintain-

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103 S. Ct. 2906, 2918, n. 10 (1983). The principle of deference to long-settled administrative action is another such doctrine. The "rule of property" doctrine also protects the stability of titles by requiring adherence to settled judicial decisions affecting title. *See United States v. Title Insurance & Trust Co.*, 265 U.S. 472, 486 (1924); *see* Point II(F), *infra*.

ing and improving its railroad facilities in their present locations for over 50 years and in not obtaining rights-of-way under other statutes when the same rights-of-way could have been obtained without the consent of Pueblos.[5] Other business and state and local governments have relied upon the interpretation in locating factories, warehouses, stockyards, streets and highways to facilitate access to AT&SF's existing route. The decisions below, invalidating rights-of-way relied upon in the development of New Mexico for over 50 years, cannot be reconciled with principles of deference to long-standing administrative action supporting titles.

B. The Administrative Interpretation Is Reasonable Because It Is Consistent with the Language and Purpose of the Pueblo Lands Act.

The language and legislative history of the Pueblo Lands Act demonstrate discrete purposes to be served by the two clauses of § 17. The Secretary's interpretation of § 17 is reasonable because it gives independent meaning to each clause of § 17 and is consistent with the purposes of the Pueblo Lands Act to settle comprehensively the status of Pueblo lands. The Tenth Circuit erred in rejecting the Secretary's interpretation that the second clause of § 17 authorized approval of rights-of-way voluntarily granted by a Pueblo.

1. *The administrative interpretation is consistent with the language of § 17; The statute does not unambiguously require subsequent Congressional authorization for voluntary Pueblo conveyances approved by the Secretary.*

The language of § 17 refutes the major premise of the Court of Appeals' decision that § 17 unequivocally re-

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[5] *See* Act of May 10, 1926, 44 Stat. 498; Act of April 21, 1928, 45 Stat. 442, 25 U.S.C. § 322 (1982); Act of March 2, 1899, ch. 374, § 1, 30 Stat. 990, 25 U.S.C. § 512 (1982); *see also United States v. Southern Pacific Transportation Co.*, 543 F.2d 676, 690-93 (9th Cir. 1976).

quires both subsequent Congressional authorization and Secretarial approval of any conveyance.[6] [App. 7-9]. That construction renders § 17 patently ambiguous because its two main clauses employ different terms to describe the subject and effect of their provisions. Thus, the two clauses cannot pertain unambiguously to the subject of voluntary conveyances to which only the second clause refers. The terms of the two clauses are sufficiently different to preclude the assertion that Congress unambiguously intended the first clause to limit or pertain to the subject matter of the second. It makes neither logical nor grammatical sense to presume that the first clause, primarily pertaining to the acquisition of rights under state law, speaks unequivocally to the subject of the second clause, addressing conveyances made by a Pueblo and approved by the Secretary. The language employed in the two clauses of § 17 makes clear that Congress intended their provisions to address different matters.

The Tenth Circuit decision misinterprets this Court's decisions as sanctioning a more limited examination of legislative intent whenever the reviewing court finds that the statutory language "clearly means what it says" [App. 6a] or reflects a supposed "plain congressional intent." [App. 9a]. The Court of Appeals disregarded the rule that the intent of a statute asserted to be unambiguous must be determined in light of the purposes of the statutory scheme of which it is a part and the construc-

[6] Section 17 of the Pueblo Lands Act provides:

> No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

tion placed upon it by the agency charged with its administration. *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 404, 409 (1975). The Tenth Circuit erred in ignoring the administrative interpretation because the language of § 17 and the statutory purpose revealed by the legislative history do not "expressly or by necessary implication foreclose" the administrative construction. *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 36 (1981).

By ignoring legislative intent and administrative construction, the Tenth Circuit's analysis was both insufficiently rigorous and contrary to established principles of statutory interpretation. The Tenth Circuit's only explanation for its conclusion that § 17 imposed two conditions upon the validity of conveyances is the observation that "[t]he two clauses of § 17 . . . are joined by the conjunctive 'and' ". [App. 8]. This explanation is deficient because the conjunctive neither harmonizes the two clauses of § 17 nor furnishes any justification for ignoring the history and purposes of the Pueblo Lands Act. Moreover, the Tenth Circuit's analysis violates the long-established requirement that "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and its object and policy." *United States v. Heirs of Boisdoré*, 49 U.S. (8 How.) 113, 122 (1850); *see also Boy's Market, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 250 (1970).

2. *The Administrative Interpretation Is Consistent with the Purpose of the Pueblo Lands Act.*

The historical context and legislative history of the Pueblo Lands Act readily supply independent purposes to the two clauses of § 17. During the long period between this Court's decisions in *United States v. Joseph*, 94 U.S. 614 (1877), and *United States v. Sandoval*, 231 U.S. 28 (1913), the accepted law in the territory of New Mexico was that the New Mexico Pueblos could convey Pueblo

lands without approval of the United States, like any fee owner. *See* Senate Hearings 51 [App. 35a]. *Sandoval* drew the efficacy of such titles into question. *See United States v. Sandoval*, 231 U.S. at 38-40.[7] The Pueblo Lands Act was intended to "settle the complicated questions of title [affecting Pueblos lands] . . ." arising from the *Sandoval* decision. House Hearings 6 [App. 46a].

The great bulk of the Pueblo Lands Act and its legislative history concern procedures for settling rights as between Pueblos and non-Indian claimants existing or asserted as of the date of the Pueblo Lands Act, June 7, 1924. The only generally applicable provision of the Act having prospective effect was § 17.[8] The legislative history of the Pueblo Lands Act indicates two principal concerns respecting the prospective legal attributes of Pueblo lands, both arising from prior uncertainty as to the applicability of federal restraints on alienation to Pueblo lands. First, Congress desired to preclude the future involuntary loss of Pueblo lands which previously had resulted from state law condemnations, effects of judgments, the non-payment of taxes, and state law adverse possession statutes. *See* Senate Hearings 51, 54 [App. 36a-37a]. Second, the legislative hearings reflect a widespread opinion held by the Pueblos, the Interior Department, and non-Indians that recognized the propriety of Pueblo conveyances approved by the Secretary. Contrastingly, the legislative history reflects no intention that Pueblo conveyances so approved should not be

[7] Not until the decision in *United States v. Candelaria*, 271 U.S. 432, 441 (1926), two years after passage of the Pueblo Lands Act, did this Court hold Pueblo lands to have been subject to federal restraints on alienation.

[8] The only provision other than § 17 having prospective application was Pueblo Lands Act § 16 which pertained exclusively to "lands adjudged by said court or Board against any [non-Indian] claimant"; § 16 authorized the Secretary, with Pueblo consent, to sell such lands to the highest bidder.

valid. *See* House Hearings 40; Senate Hearings 50, 72-73, 154-155 [App. 46a, 35a-43a].[9]

The two clauses of § 17 are the only provisions of the Pueblo Lands Act that address these dual concerns. The first clause of § 17 addresses the congressional concern to prevent the involuntary loss of Pueblo lands. The clarification that such "rights" thereafter could not be "acquired or initiated" under state law was needed specially because substantial portions of the Pueblo Lands Act provided procedures by which non-Indians could maintain titles held by virtue of adverse possession or could assert other state legal or equitable defenses. *See* Pueblo Lands Act §§ 2-5. The first clause also precludes alienation pursuant to other federal Indian statutes then in force, many of which authorized Secretarial grants without tribal consent. *See, e.g.*, 25 U.S.C. §§ 311-321 (1982). This presumably was a response to assertions that the Pueblos desired to maintain some voice in the management of their lands. House Hearings 134; Senate Hearings 77 [App. 37a, 43a].[10]

[9] The prevailing belief that approval by the United States would validate Pueblo conveyances was further reflected in a written statement submitted by the Pueblos to Congress. *See* Brief to Congress In the Matter of The New Mexico Pueblo Lands "White Claims Upon Lands Granted to the Pueblos." National Archives file G.S. 013-1921, 45918 Pt. 8-Pt. 8-19. [Excerpts reproduced as Appendix J, App. 63a-68a]. By disregarding these contemporaneous statements, the decision below conflicts with the requirement that Indian statutes "must be read in light of common notions of the day and the assumption of those who drafted them . . . ." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978).

[10] As this Court stated, "Congress may relieve the Indians from [its] . . . guardianship and control, in whole or in part, and may, if it sees fit, clothe them with full rights and responsibilities concerning their property, or give them a partial emancipation if it thinks that course better for their protection." *United States v. Waller*, 243 U.S. 452, 459-60 (1917). Section 17 continued the "partial emancipation" respecting Pueblo fee-owned lands, begun in the

The second clause of § 17 imposes only the express restraint upon alienation of Secretarial approval of conveyances voluntarily "made" by a Pueblo but does not disallow those conveyances. This provision is consistent with legislative recognition of the propriety of Pueblo conveyances approved by the Secretary. Thus, § 17 is clear, direct and unambiguous when given the meaning adopted by the Secretary, but its provisions are inconsistent and ambiguous under the interpretation adopted by the Tenth Circuit. The language of § 17's second clause, "read together with the rest of the Act, as it must be . . . ," *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 403 (1975), compels the conclusion that § 17 was intended to provide authority for future conveyances by the Pueblos.[11]

The Court of Appeals' interpretation that § 17 prohibited, rather than authorized, grants of rights-of-way by Pueblos with the consent of the Secretary further conflicts with the overriding statutory purpose of the Pueblo Lands Act to settle comprehensively the status of Pueblo lands. *See* S. Rep. No. 1175, 67th Cong., 4th Sess. 5 (1923) [App. 46a]. The construction of the courts below would result in an anomaly neither suggested by the legislative history nor addressed by the Tenth Circuit: the Pueblo Lands Act would have rendered Pueblos, unlike all other Indian tribes, powerless to convey publicly needed rights-of-way or any other interest in their lands, even

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Spanish era, allowing voluntary conveyances with Secretarial approval while protecting against involuntary alienation. *See United States v. Candelaria*, 271 U.S. at 442.

[11] The Tenth Circuit suggests it considered itself bound to resolve any ambiguities in statutory language in favor of the Pueblo [App. 9]. That conclusion disregards that the rule cited is "at base a canon for construing" statutes and "is not a license to disregard clear expressions of tribal and congressional intent." *De Coteau v. District County Court*, 420 U.S. 425, 447 (1975); *see also Rice v. Rehner*, 103 S.Ct. 3291, 3302 (1983).

with Secretarial approval.[12] The legislative history precludes this interpretation of the Pueblo Lands Act.

Congress should not be deemed to have intended, *sub silentio*, to preclude any conveyances of Pueblo lands in a bill designed to "settle the complicated questions of title" affecting Pueblo lands. House Hearings 6 [App. 46a]. The Tenth Circuit's conclusion that Congress intended to leave the whole matter of prospective conveyances to some future Congress while inexplicably imposing a requirement of Secretarial consent on conveyances "made" by a Pueblo is not only nonsensical, but also conflicts with the central legislative purpose to resolve questions respecting Pueblo lands. The Court of Appeals erred in discarding the administrative interpretation that achieved this central purpose.

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[12] That the Pueblos understood the Pueblo Lands Act would authorize grants of new railroad rights-of-way to AT&SF is indicated by the transcript of the council of Pueblo delegates held on January 17, 1924 at the Pueblo of Santo Domingo to confirm their position on the pending legislation. [Excerpts of text reproduced as Appendix H, App. 43a-62a]. At that council, then Pueblo representative in the legislative hearings, and later Commissioner of Indian Affairs, John Collier, specifically addressed AT&SF's rights-of-way:

> Now the Pueblos have already said that they are willing to give up their title to the . . . rights-of-way of the railroads, if those rights-of-way have been paid for,—if the Indians had payment for them. That means proper payment,—the payment they ought to have. [App. 59a].

Thereafter, AT&SF paid new consideration for its presently challenged § 17 rights-of-way. The Pueblos subsequently confirmed to AT&SF their desire that AT&SF continue to operate on their lands. As stated in Collier's July 20, 1928 letter to Mr. W.B. Storey, President of AT&SF [Excerpts reproduced as Appendix G, App. 48a-49a]:

> In many ways the interests of the Pueblo Indians and of the Santa Fe Railway are identical; . . . Ultimately the chief outside force in making possible a future for these Pueblos will be the Santa Fe Railway, as we are increasingly convinced.

C. Principles Underlying Federal Restraints on Alienation Support the Validity of Rights-of-Way Granted by a Pueblo and Approved by the Secretary Pursuant to §17.

The decisions below are further flawed by their premise that an interpretation of § 17 consistent with that given the Indian Nonintercourse Act of 1834, 4 Stat. 730, 25 U.S.C. § 177 (1982) ("Nonintercourse Act"), would require a greater expression of Congressional intent to validate voluntary tribal conveyances than § 17's express provision that such conveyances shall be invalid unless approved by the Secretary.[13] The District Court concluded that the second clause of § 17 did not comport with prerequisites of the Nonintercourse Act because it "was not a clear and express grant of authority to the Secretary and the Pueblos to alienate Pueblo lands." [App. 39]. The Court of Appeals affirmed the trial court's view that "§ 17 was intended as an extension to the Pueblos of the Nonintercourse Act, in prohibiting alienation of Pueblo lands except as Congress may provide in the future and as approved by the Secretary." [App. 5]. Contrary to the premises of the lower courts, this Court consistently has recognized the validity of conveyances pursuant to comparable provisions, and its decisions affirm a tribal power of alienation subject to the federal supervision designated in statutory restraints on alienation.

The Nonintercourse Act and its predecessor enactments contemplate, rather than prohibit, conveyances by tribes subject to statutorily designated federal supervision. This contemplation was incorporated in the first Indian Nonintercourse Act, passed in 1790. Act of July 22, 1790, ch.

[13] Neither the District Court nor the Court of Appeals explain why the Nonintercourse Act would have continuing effect notwithstanding the provisions of the Act of March 3, 1871, ch. 120, § 1, 16 Stat. 566, 25 U.S.C. § 71 (1982), which establishes that the intent of Congress in each subsequent enactment is controlling. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

33, § 4, 1 Stat. 137.[14] While the legislative history of the 1790 Act is meager, President George Washington, one of its chief proponents, described the purpose of that Act in a speech to the Seneca Nation in December 1790:

> But, your great object seems to be, the security of your remaining lands; and I have, therefore, upon this point, meant to be sufficiently strong and clear, that, in the future, you cannot be defrauded of your lands; that you possess the right to sell, and the right of refusing to sell, your lands; that, therefore, the sale of your lands, in future, will depend entirely on yourselves. But that, when you may find it for your interest to sell any part of your lands, the United States must be present, by their agent, and will be your security that you shall not be defrauded in the bargain you make.

American State Papers (Indian Affairs, Vol. I, 1832) 142; *see* F. Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts* 44 (1962). The language and legislative history of the Nonintercourse Act indicate that it did not modify these prior Indian lands policies. H.R. Rep. No. 474, 23rd Cong., 1st Sess. (1834); *see Munez v. Hoffman*, 422 U.S. 454, 470 (1975).

The attempt of the Court of Appeals to engraft upon the historic interpretation of federal restraints on alienation a rule that Congress may not authorize a conveyance by specifying a form of federal supervision applicable to the conveyance is unsupportable. Federal restraints on alienation of Indian lands follow the principle established during the period of discovery and colonization that the

[14] Statutory recognition of tribal power to alienate subject to federal supervision over the conveyance was carried forward in additional "temporary" Nonintercourse Acts, Act of March 1, 1793, ch. 19, § 8, 1 Stat. 329; Act of May 19, 1796, ch. 30, § 12, 1 Stat. 469; Act of March 3, 1799, ch. 46, § 12; 1 Stat. 743, and in the first "permanent" Nonintercourse Act, Act of March 30, 1892, ch. 13, § 12, 2 Stat. 139.

"nation making the discovery [obtained] the sole right of acquiring the soil and of making settlements of it . . . [Discovery] gave the exclusive right to purchase, but did not found that right on a denial of the right of the [tribal] possessor to sell." *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 244 (1872); *see also Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 573 (1823); *see generally* F. Prucha, *American Indian Policy* 31-45 (1962). Chief Justice Marshall's decision in *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 736-60 (1835), surveyed the legal history of restraints on alienation of Indian lands in the English and Spanish colonies and in the United States and found restraints on alienation under the three governments to be comparable. In rejecting the contention that a conveyance of Indian land was invalid because approved only by a local Spanish governor, and not by direct royal confirmation, this Court concluded that:

> The Indian right to the lands as property was not merely of possession, that of alienation was concomitant; both were equally secured, protected and guaranteed by Great Britain and Spain, subject only to ratification and confirmation by the license, charter, or deed from the governor representing the king.

Id. at 759-60. The Indian Nonintercourse Acts did not alter these colonial rules; those Acts "recognized and enforced" them. *Jones v. Meehan*, 175 U.S. 1, 9 (1899).

Justice Van Devanter's decision for this Court in *United States v. Candelaria*, 271 U.S. 432, 442 (1926), found restraints on alienation held by that decision to have been imposed on Pueblo lands by the Act of February 27, 1851, 9 Stat. 582, to be comparable to the Spanish and Mexican rules allowing Pueblo conveyances with governmental approval:

> Thus it appears that Congress in imposing a restriction on the alienation of those lands as we think it did, was but continuing a policy which prior governments had deemed essential to the protection of such lands.

See, e.g., Chouteau v. Moloney, 57 U.S. (16 How.) 203, 207 (1853) (Spanish colonial law); *United States v. Pico*, 72 U.S. (5 Wall.) 536, 540 (1867) (Mexican colonial law). Thus, § 17's provision for supervision of Pueblo conveyances by a statutorily designated federal official fully comports with historic requirements applicable to restraints on alienation. The Nonintercourse Act confirms this proposition because the treaties and conventions by which it authorized tribes to convey their lands were not enactment of the full Congress, but agreements made by a representative of the President with the advice and consent only of the Senate. *See* F. Cohen, *Federal Indian Law* 39 (Univ. of N.M. Reprint, 1942 ed.).[15]

This Court consistently has recognized that statutes affirmatively imposing a restraint upon alienation give rise to valid title upon satisfaction of the stated condition. *Pickering v. Lomax*, 145 U.S. 310 (1892), held valid a deed granted pursuant to a treaty provision comparable to the second clause of § 17, which stated:

> The tracts of land herein stipulated to be granted shall never be leased or conveyed by the grantees, or their heirs, to any persons whatever, without the permission of the president of the United States.

145 U.S. at 311. This Court's interpretation of that treaty provision strongly supports the administrative construction of § 17:

> The object of the proviso was not to prevent the alienation of lands *in toto*, but to protect the Indian against the improvident disposition of his property, and it will be presumed that the president, before

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[15] As this Court concluded upon review of the Nonintercourse Acts,

> It is well settled that a good title to parts of the lands of an Indian tribe may be granted to individuals by a treaty between the United States and the tribe, without any act of Congress, or any patent from the Executive authority of the United States.

Jones v. Meehan, 175 U.S. 1, 10 (1899).

affixing his approval, satisfy himself that no fraud or imposition had been practiced upon the Indian when the deed was originally obtained.

145 U.S. at 316. *See also Lomax v. Pickering*, 173 U.S. 26 (1899); *Smith v. Stevens*, 77 U.S. (10 Wall.) 321 (1870).[16]

For nearly two centuries, and until the decisions under review, courts have uniformly considered that statutes imposing a restraint on alienation imply the validity of conveyances rendered upon satisfaction of the restraint. The engrafting by the decision below of an additional requirement that Congress more affirmatively authorize the conveyance would unquestionably cloud countless outstanding titles. The decision below should be reversed to correct this fundamental misapprehension of the nature of federal restraints on alienation and of the Pueblo Lands Act and, further, to prevent unwarranted clouding of long-settled titles.

II. THE TENTH CIRCUIT OPINION IGNORES CONGRESSIONAL INTENT THAT DECREES ENTERED IN PUEBLO LANDS ACT QUIET TITLE SUITS BE FINAL AND PRECLUSIVE.

Policies of finality underlying the Pueblo Lands Act and the *res judicata* doctrine require that orders of dismissal, such as the May 31, 1928 order of dismissal ("Order of Dismissal") dismissing claims against Mountain Bell in *United States as Guardian of the Pueblo of Santa Ana v. Brown*, No. 1814 in Equity (D.N.M. 1927) ("United States v. Brown"), bar the present action by the Pueblos.[17] The parties' agreement as to the conditions upon which dismissal of the Pueblo Lands Act quiet title suit would be entered, resulting in the United States' filing of its motion to dismiss and entry of the Order of Dismissal, was intended to effect a final resolution of the same claims between the same parties or their privies as are asserted in the present case.[18] Failure to accord preclusive effect to the Order of Dismissal conflicts with Congress' intent that valid non-Indian title be confirmed by consent decrees in Pueblo Lands Act quiet title actions that would have "the effect of a deed of quit-claim as against the United States and said Indians . . .". Pueblo Lands Act § 5 [App. 25a]. Finally, the opinion below erroneously disregards that the numerous orders of dismissal recognizing the validity of rights-of-way acquired by virtue of § 17 establish a rule of property conclusive as to the confirmed titles.

A. The Tenth Circuit Failed to Accord the Consent Decree Preclusive Effect in Accordance with the Intention of the Parties.

The opinion below erred in characterizing the Order of Dismissal as a voluntary "dismissal without prejudice"

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[16] The Court of Appeals' decision may cloud numerous other titles resting upon statutory authority similar to § 17. Statutes pertaining to lands of the Five Civilized Tribes, whose fee-owned lands have been held subject to restraints on alienation similar to those applicable to Pueblos, *see United States v. Sandoval*, 231 U.S. at 28, are strikingly similar to § 17. Act of May 27, 1908, § 9, 35 Stat. 312 (reproduced, App. 50a); Act of July 2, 1945, 59 Stat. 313 (reproduced, App. 51a); *see also* Act of February 27, 1925, § 3, 43 Stat. 1008 (Osage Tribe) (reproduced, App. 52a). The efficacy of such provisions has been recognized. *Tiger v. Western Investment Co.*, 221 U.S. 286, 308-09 (1911); *United States v. City of McAlester, Oklahoma*, 604 F.2d 42, 47 (10th Cir. 1979); *Tiger v. Sellers*, 145 F.2d 920, 923 (10th Cir. 1944). The Nonintercourse Act model has also been employed for other purposes. *See* Act of September 1, 1937, § 10, 50 Stat. 900 (restraint on alienation of Indian-owned reindeer).

[17] Like Mountain Bell, AT&SF was dismissed from a number of Pueblo Lands Act quiet title actions when, after negotiations with the United States (acting on behalf of the Pueblos) and the acquisition by AT&SF and approval by the Secretary of § 17 rights-of-way, the parties concluded that AT&SF's "rights and title . . . are valid . . .". *See, e.g., United States as Guardian of the Pueblo de Acoma v. Arvizo*, No. 2079 in Equity (D.N.M., decree entered May 14, 1931).

[18] The opinion below did not deny that the present action involves the same claims between the same parties as did the earlier action; rather, the court based its decision on its conclusion that there was no "final judgment in the first suit." [App. 10a].

rather than as a consent decree. The Tenth Circuit failed to recognize that the preclusive effect of the Order of Dismissal is derived from the contractual agreement of the parties, not from the technical characterization of the form of dismissal. *See United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235 (1975).

The Tenth Circuit does not dispute that the Order of Dismissal was entered in compliance with the agreement between the parties that Mountain Bell would acquire good and sufficient title under § 17 satisfactory to the United States and the United States would, therefore, dismiss its quiet title suit as against Mountain Bell.[19] [J.A. 64-69]. Consequently, the Order of Dismissal constitutes a consent decree because it "represents an agreement between the parties settling the underlying dispute and providing for the entry of judgment in a pending . . . action." James, *Consent Judgments as Collateral Estoppel*, 108 U. Pa. L. Rev. 173, 175 (1959). The Tenth Circuit erred in failing to accord that consent decree the preclusive effect intended by the parties.

The opinion below further errs in relying on the observation that the consent decree in *United States v.*

[19] That the Order of Dismissal was entered pursuant to the agreement of the parties was established in the record before the District Court by correspondence between the counsel for the United States and Mountain Bell. [J.A. 64-69]. In a March 10, 1928, letter to counsel for Mountain Bell, Mr. George Fraser, Special Assistant to the Attorney General, wrote: "I wish to take the bill *pro confesso* against various defendants who have not appeared, but will not do so as against your company if satisfied that its title will presently be perfected." [J.A. 65]. Subsequently, Mountain Bell obtained Secretarial approval, thereby perfecting its title. [J.A. 38, 65-67]. In response, Mr. Fraser wrote: "Thank you for . . . informing me that your conveyance from the Pueblo of Santa Ana has been approved by the Secretary of the Interior. I have pleasure in enclosing herewith copy of order of dismissal as against your company just entered by the Federal Court in this suit." [J.A. 67-68]. The decree thus entered reflected the intention to establish Mountain Bell's title as valid: it recited that Mountain Bell had obtained "good and sufficient title" under § 17. [J.A. 37].

Brown "indicates neither the Court's consideration nor approval of the [consent] agreement . . . [T]here is no showing that the Court was given a copy of the agreement. There were no findings of fact or conclusions of law." [App. 11a].[20] This analysis ignores that "it is inappropriate to search for the 'purpose' of a consent decree and construe it on that basis. The *decree* itself cannot be said to have a purpose; rather the *parties* have purposes . . . ." *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 235 (1975), *citing United States v. Armour & Co.*, 402 U.S. 675, 681-82 (1971) (emphasis in original). In this case, the "purpose" of the parties to the consent decree was to establish conclusively the validity of Mountain Bell's rights-of-way. The decisions of this Court required the courts below to give effect to that intention.

B. The Pueblo Lands Act Contemplates That Consent Decrees Be Entered To Confirm Non-Indian Titles Which The United States Determined Were Valid After Commencement of Suit.

The Pueblo Lands Act required that quiet title suits filed by the United States on behalf of Pueblos be all-encompassing and that adjudications in those suits finally determine all non-Indian claims "of any kind whatsoever" to Pueblo lands. Pueblo Lands Act § 1 [App. 22a]. The Senate hearings make clear that Congress contemplated that consent decrees would be entered in "perhaps 90 percent of these adverse claims that can be recognized without litigation . . . ." Senate Hearings 102-03 (Statement of Sen. Jones) [App. 41a]; *see also Senate Hearings* 102-03, 242 (Statements of Sen. Lenroot, Com-

[20] The entry of "findings of fact or conclusions of law" is not material to the order's *res judicata* effect. "It is a misconception of *res judicata* to assume that the doctrine does not come into operation if a court has not passed on the 'merits' in the sense of the ultimate substantive issues of a litigation." *Angel v. Bullington*, 330 U.S. 183, 190 (1947).

missioner of Indian Affairs, Burke, and Mr. Francis Wilson, Pueblo representative) [App. 41a]. Those statements reflect Congress' intention that, where claims were made by the United States which could be resolved without further litigation, the validity of the claimants' title should be confirmed by consent decre entered in the quiet title suits:

Senator Lenroot (Chairman of the Sub-committee on Indian Affairs):

> The bill you have introduced provides for a decree in a single case.

Mr. Francis Wilson (a Pueblo representative):

> That is correct, so there will be a *res judicata* there . . . I have had it in mind that there should be a *pro forma* adjudication of uncontested titles, just as long as there is going to be this same turmoil arising; and if it can be brought about so that it is finally adjusted it will be most desireable. If I had one of those titles today, I would want to be included in a suit, by disclaimer or consent to an agreed claim, even though I knew my title was absolutely good. I would want a decree as to that.

Senate Hearings at 242. [App. 44a-45a].

Congress' intent is further confirmed by the last provision in Section 5 of the Pueblo Lands Act. That provision states that a decree entered in favor of non-Indian claimants upon any grounds including, but not limited to, the statute of limitations defense "shall have the effect of a deed or quit-claim as against the United States and said Indians". [App. 25a]. Congress' express consideration of the role of consent decrees in the quiet title actions, and its inclusion in the Pueblo Lands Act of a provision confirming the finality of such decrees, require that consent decrees or judgments in Pueblo Lands Act suits be given preclusive effect.

C. In Providing For Quiet Title Suits Under the Pueblo Lands Act, Congress Chose A Procedure Intended to Ensure A Final Adjucation of Titles.

Congress' express provision for quiet title suits to resolve disputed claims to title reflects its intent that conflicting claims to Pueblo lands be finally resolved within the procedures prescribed by the Pueblo Lands Act. As this Court observed in *United States v. California & Oregon Land Co.*, 192 U.S. 355, 359 (1904), Congress' choice of a quiet title procedure indicates an intention to "settle the title once and for all." Like the water rights adjudication suit considered in *Nevada v. United States*, 103 S.Ct. 2906, 2925 (1983), quiet title actions under the Pueblo Lands Act were "no garden variety quiet title action[s]." They were "intended by all concerned, lawyers, litigants and judges, as . . . general all inclusive . . . adjudication suit[s] which sought to adjudicate all rights and claims . . ." *Id.* at 2913. The procedure chosen by Congress to accomplish that objective was, as it is today, "distinctively equipped to serve [the policies of *res judicata*]. *Id.* at 2918, n. 10.

Congress' providing that Pueblo Lands Act quiet title suits be resolved under the equity jurisdiction of United States District Courts further reflects an intention that the order entered by the court sitting in equity finally resolve the controversy, regardless whether a particular defendant's claims were fully adjudicated on the substantive merits or were dismissed by consent decree. "The fundamental principle of equity in relation to judgments is, that the court . . . frames its decree as to bar all future claims of any party before it which may arise from the subject matter, and which are within the scope of the present adjudication." 1 J. Pomeroy, *Equity Jurisprudence* § 1015 at 154 (5th Ed. 1941). As Congress was aware, courts of equity determined the rights of all parties before them and granted "the relief requisite to meet the ends of justice, in order to *prevent a multiplicity of*

suits . . . ." 1 J. Pomeroy, *Equity Jurisprudence* § 243 at 462 (5th Ed. 1941) (emphasis in original). The courts below erred in invalidating rights-of-way confirmed by decrees entered pursuant to the Pueblo Lands Act because preventing the multiplicity of suits now confronting both Mountain Bell and AT&SF was precisely the intended effect of Pueblo Lands Act §§ 3 and 5 [App. 24a-25a].

D. The Merits of the Prior Action Cannot Deprive A Consent Decree of Preclusive Effect.

The Tenth Circuit opinion incorrectly contends that the Order of Dismissal had no preclusive effect because an earlier judgment on the merits in favor of Mountain Bell assertedly would have been based on an erroneous application of law. This contention falls before this Court's holdings that, when a court has jurisdiction over the subject matter and the parties its final decree "which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause." *Swift & Co. v. United States*, 276 U.S. 311, 324 (1928), *citing Nashville, Chattanooga & St. Louis Railway Co. v. United States*, 113 U.S. 261, 266 (1885).

The Tenth Circuit's exclusive reliance on *National Life & Accident Insurance Co. v. Parkinson*, 136 F.2d 506 (10th Cir. 1943), for its contention that "[c]ourts do not validate that which is invalid merely by consenting to a dismissal of the controversy over which its jurisdiction has been involved" [App. 11a], exposes the error in its holding. In *National Life*, the statute vesting jurisdiction in the court which entered the consent decree was declared unconstitutional, thereby depriving the district court of subject matter jurisdiction over the controversy. For the sole reason that the consent decree was entered by a court without jurisdiction, it was held not to bar a subsequent action. The *National Life* decision is, therefore, consistent with the holdings of this Court that consent decrees must be enforced where "the Court had

jurisdiction of the subject matter and of the parties. . ." *Swift & Co. v. United States*, 276 U.S. at 330.

The Court of Appeals' extension of the *National Life* holding to the present case, where no party contends that the Pueblo Lands Act failed to vest federal equity courts with jurisdiction over quiet title suits, is plainly in error because it "fails to distinguish an error in decision from the want of power to decide." *Swift & Co. v. United States*, 276 U.S. at 331. When a court with jurisdiction over the subject matter and the parties enters a consent decree, "even gross error in the decree would not render it void." *Id.* at 330. The district court in *United States v. Brown* had jurisdiction over the subject matter and the parties; the Tenth Circuit erred in not according the Order of Dismissal *res judicata* effect.

E. The Form Of The Order Of Dismissal Did Not Deprive It Of Preclusive Effect.

The courts below also erred in concluding that the Order of Dismissal was not a final judgment entitled to *res judicata* effect because it did not state whether it was with or without prejudice and assertedly must be presumed to be "without prejudice". [App. 10a]. That conclusion ignores the rules governing federal equity practime at the time the Order of Dismissal was entered and the rule that the intentions of the parties are controlling.[21]

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[21] The Court of Appeals' reliance on *In re Skinner & Eddy Corp.*, 265 U.S. 86, 91 (1924), and *Home Owners Loan Corp. v. Huffman*, 134 F.2d 314 (8th Cir. 1943), for this proposition is belied by a reading of those cases. Each involved situations where the plaintiff chose to dismiss its action expressly "without prejudice" and the defendant opposed the motion, and neither case involved a consensual dismissal. The cases do not address the equity court rules that "where no words of qualification appear in the order of dismissal, it is presumed to be rendered on the merits and is a bar to a subsequent bill for the same cause." *See* 1 R. Whitehouse, *Equity Practice* § 331 at 554 (1915); 2 T. Street, *Federal Equity Practice* § 1348 at 817 (1909).

Prior to the adoption of the Federal Rules of Civil Procedure in 1938, the rules pertaining to "bills" in equity were different from those applicable to actions at law. If the plaintiff in equity desired to dismiss an equitable action without being precluded in a subsequent suit, the action was required to have been dismissed expressly "without prejudice": "Where words of qualification, such as 'without prejudice' or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on the merits." *Lyon v. The Perin & Gaff Manufacturing Co.*, 125 U.S. 698, 702 (1888), *quoting Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 109 (1869). Contrary to the assertions underlying the Tenth Circuit opinion, the prevailing rules of equity practice at the time of entry of the Order of Dismissal mandate the conclusion that final decrees entered in equitable quiet title actions were intended to be dismissals with prejudice and bar subsequent actions.

F. The Orders Of Dismissal Established Rules of Property No Longer Subject To Judicial Reconsideration.

This Court's decision in *Nevada v. United States*, 103 S.Ct. 2906 (1983), confirms principles which squarely reject the holdings below. First and paramount, this Court determined in that case that the policies of *res judicata* are particularly applicable, and specifically bind Indian tribes, when they concern final decrees entered decades ago which confirm interests in property; indeed, "[t]he policies advanced by the doctrine of *res judicata* perhaps are at their zenith" in such cases. *Nevada v. United States*, 103 S.Ct. at 2918, n. 10. Those principles of finality apply to an Indian tribe in actions in which it was represented by the United States regardless whether

it had the opportunity to intervene, was a party, or alleges a conflict of interest.[22] *Id.* at 2916.

Just as in the quiet title suit adjudicating water rights in *Nevada v. United States*, the dispute resolution policies underlying Pueblo Lands Act quiet title suits require that the Order of Dismissal be accorded *res judicata* effect. Numerous Pueblo Lands Act final decrees expressly affirming the validity of rights-of-way granted by a Pueblo and approved by the Secretary under § 17 establish the "rule of property" recognized in *Nevada v. United States*: These principles of according finality to conclusive adjudications of real property rights have long been recognized by this Court. *See, e.g., Arizona v. California*, 439 U.S. 419 (1983); *United States v. Title Insurance & Trust Co.*, 265 U.S. 472, 486 (1924); *Minnesota Mining Co. v. National Mining Co.*, 70 U.S. (3 Wall.) 332, 334 (1866). The Order of Dismissal should preclude this suit.

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[22] An examination of the Pueblo's claims reveals its apparent dissatisfaction to be with actions taken by the United States in approving the rights-of-way. Those contentions were required to have been timely litigated before the Indian Claims Commission or be forever barred. Indian Claims Commission Act of 1946, 60 Stat. 1049, *formerly codified* at 25 U.S.C. §§ 70-70u (1976); *see also Oglala Sioux Tribe v. United States*, 650 F.2d 140 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982). "If, in carrying out their role as representative, the Government violated its obligations to the [Pueblo], then the [Pueblo's] remedy is against the Government, 2925, n. 16 (1983). Like most Pueblos, the Pueblo of Santa Ana 2925, n.16 (1983). Like most Pueblos, the Pueblo of Santa Ana sued the United States before the Indian Claims Commission, *Pueblo of Santa Ana v. United States*, Indian Claims Commission Docket No. 137, and received compensation in that action. *Pueblo of Santa Ana v. United States*, 33 Ind. Cl. Comm. 16 (1974).

CONCLUSION

For the foregoing reasons, *amicus curiae*, The Atchison, Topeka and Santa Fe Railway Company, prays that the decision of the Court of Appeals for the Tenth Circuit be reversed.

Respectfully submitted this 23rd day of November, 1984.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SLIP OPINION

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 83-1220

PUEBLO OF SANTA ANA,
Plaintiff-Appellee,

vs.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,
Defendant-Appellant.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Amicus Curiae

PUEBLO DE ACOMA,
Amicus Curiae

PUBLIC SERVICE COMPANY OF NEW MEXICO,
Amicus Curiae

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

(D.C. No. 80-841-M Civ.)
(Filed May 14, 1984)

Scott E. Borg of Luebben & Hughes, Albuquerque, New Mexico, for Plaintiff-Appellee.

Kathryn Marie Krause, Denver, Colorado (Stuart S. Gunckel, Denver, Colorado, with her on the brief) for Defendant-Appellant.

Gary Crosby, Santa Fe Industries, Inc., Chicago, Illinois and John R. Cooney, Lynn H. Slade, John S. Thal and Walter E. Stern, III of Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, New Mexico, filed briefs on behalf of Amicus Curiae The Atchison, Topeka and Santa Fe Railway Company. Public Service Company of New Mexico joined in the Amicus Briefs of The Atchison, Topeka and Santa Fe Railway Company.

Arturo G. Ortega of Ortega & Snead, P.A., Albuquerque, New Mexico and Peter C. Chestnut of Albuquerque, New Mexico, filed a brief on behalf of Amicus Curiae of Pueblo de Acoma.

Before McWILLIAMS BREITENSTEIN and LOGAN, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This is an interlocutory appeal from the United States District Court for the District of New Mexico which we permitted to be filed. The court granted partial summary judgment to the plaintiff-appellee, Pueblo of Santa Ana, and against the defendant-appellant, Mountain States Telephone and Telegraph Company, Mountain Bell. The dispute involves a right of way for a telephone and telegraph line across Pueblo lands. The trial court held in favor of the Pueblo and Mountain Bell appeals. We affirm.

The Pueblo was the owner of a trace of land situated in New Mexico which was a part of the El Ranchito

Grant. In November, 1927, the United States pursuant to the Pueblo Lands Act, 43 Stat. 636, filed an action in the federal district court for the district of New Mexico entitled United States as Guardian of the Pueblo of Santa Ana v. Brown, No. 1814 Equity (D.N.M. 1928), seeking to quiet title to this tract in the Pueblo. Mountain Bell was party to that suit. During the course of that litigation, the Pueblo entered into a right-of-way agreement with Mountain Bell, dated February 23, 1928, granting an easement to construct, maintain, and operate a telephone and telegraph line, the same line that is in controversy here. Acting pursuant to § 17 of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636, 641-642, the Secretary of the Interior approved the agreement. The United States then moved to have Mountain Bell dismissed from the action on the ground that it had obtained title to the right of way through the easement agreement. In granting this motion, the court noted that it appeared "that since the institution of this suit said defendant has secured good and sufficient title to the right of way and premises in controversy. . . ."

In the present action Mountain Bell argues that it obtained a valid right of way across the Pueblo's land in 1928 and under § 17 of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636. It argues further that the Pueblo's claims are barred by the 1928 dismissal of the case involving the same parties and issues. On these grounds, Mountain Bell moved for summary judgment that no trespass existed from 1928 to the present. The district court held, however, that § 17 did not authorize conveyance of lands by the Pueblo with the approval of the Secretary. The district court accepted the Pueblo's argument that § 17 was intended as a prohibition against the alienation of Pueblo lands except as Congress may provide in the future. Its requirements of Congressional authorization and Secretarial approval paralleled and were intended to extend to the Pueblo the Nonintercourse Act's requirement of a treaty or convention entered into

pursuant to the Constitution. See Acts of June 30, 1834, 4 Stat. 729, 730 § 12 (codified at 25 U.S.C. § 177), and February 27, 1851, 9 Stat. 574, 587 § 7. The court further held that the Pueblo's claims were not barred by the 1928 dismissal order because that order did not constitute a final judgment.

Section 17 of the Pueblo Lands Act provides:

> "No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, *or in any other manner except as may hereafter be provided by Congress, and* no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity *unless the same be first approved by the Secretary of the Interior.*" [Emphasis supplied.]

Mountain Bell challenges the argument of the Pueblo, upheld by the trial court, that § 17 was intended as an extension of the Pueblos of the Nonintercourse Act, in prohibiting alienation of Pueblo lands except as Congress may provide in the future and as approved by the Secretary. Mountain Bell argues that the first clause of § 17 requires Congressional approval for condemnations and other similar takings of Pueblo lands and that the second clause authorizes a pueblo to alienate its lands if it obtains Secretarial approval. Analysis of these arguments requires an examination of the language, the historical background, the legislative history, and the administrative history of the Act.

The Nonintercourse Act required a treaty or convention to alienate Indian lands, Act of June 30, 1834, 4

Stat. 729, 730 § 12 (codified at 25 U.S.C. § 177). The Act of February 27, 1851, 9 Stat. 574, 587 § 7, extended all laws then in force regulating trade and intercourse with the Indian tribes to include Indian tribes in the Territory of New Mexico.

In State of New Mexico v. Aamodt, 10 Cir., 537 F.2d 1102, cert. denied 429 U.S. 1121, a water rights case, we reviewed the historical background of the controversy, pp. 1105 and 1109, and pointed out, p. 1105, that the efforts of federal officials to protect the Pueblos' property were frustrated by the New Mexico territorial courts which held that the Pueblos were outside the protection of federal laws. This rationale was upheld by the Supreme Court in United States v. Joseph, 94 U.S. 614.

We noted, at p. 1105, that the 1910 New Mexico Enabling Act, 36 Stat. 557, 558-559, defined "Indian country" to include "all lands now owned or occupied by the Pueblo Indians" and stated that such lands are "under the absolute jurisdiction and control of the Congress of the United States." The constitutionality of this provision was upheld in United States v. Sandoval, 231 U.S. 28, which specifically overruled United States v. Joseph. The Court said, Id. at 39, that,

> "The people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government."

The Court noted that the United States has treated the pueblos "as requiring special consideration and protection, like other Indian communities." Id.

Because in the *Joseph* decision the Supreme Court decided that the Pueblo lands were not subject to the protective laws earlier passed by Congress, non-Indians were free to acquire Pueblo lands. The validity of titles so acquired became questionable when in Sandoval the Court held that the protective federal statutes did apply

and presumably always had applied. Congress responded with the passage in 1924 of the Pueblo Lands Act, 43 Stat. 636. The Act established a "Pueblo Lands Board" to investigate the Pueblo lands and determine those cases in which the Indian title should be extinguished. The United States as guardian of the Pueblos was required to institute quiet title actions to settle adverse claims to Pueblo lands. Non-Indians claiming title could plead adverse possession and the statute of limitations, defenses not ordinarily available against the United States.

In 1926, the Court in United States v. Candelaria, 271 U.S. 432, reaffirmed Sandoval. In so doing, it said after referring to the 1834 and 1851 acts, p. 441:

> "While there is no express reference in the provision to the Pueblo Indians, we think it must be taken as including them. They are plainly within its sight, and, in our opinion, fairly within its words, 'any tribe of Indians.'"

We echoed this language, noting the application of the Nonintercourse Act to the Pueblo Indians in Aamodt, supra. In Plains Elec. Gen. & Tr. Co-op v. Pueblo of Laguna, 10 Cir., 542 F.2d 1375, 1376, we cited Candelaria as authority for the statement that "Lands of the Pueblos cannot be alienated without the consent of the United States." In United States v. University of New Mexico, No. 83-1238, 10 Cir. opinion filed April 9, 1984, we noted that Congress extended the Nonintercourse Act to the Pueblos in 1851 and said that § 17 of the Pueblo Lands Act of 1924 "reaffirmed that the Pueblos and their lands were fully under the guardianship of Congress and the protection of the Nonintercourse Act." Slip Op. at 7. In so doing we noted the following statement in United States v. Chavez, 290 U.S. 357, 362:

> "[T]he status of the Indians of the several Pueblos in New Mexico is that of dependent Indian tribes under the guardianship of the United States and that

> by reason of this status they and their lands are subject to the legislation of Congress enacted for the protection of tribal Indians and their property."

Thus we have three times held that the Pueblo's lands were under the protection of the Nonintercourse Act.

Mountain Bell argues that § 17 was not a grant of power to the Pueblos to convey their lands, but instead reaffirmed the power of alienation which already existed in the Pueblos, and implemented the government's guardianship role by restricting that power. This view is insupportable. The House Report on the Pueblo Lands Act, reprinting the language of the Senate Report, states:

> "It was only by the decision of the case of the *United States v. Sandoval* (213 U.S. 28) that the Supreme Court of the United States definitely established the principle that these Indians were wards of the Government. . . .
>
> Up to the time of the decision of the *Sandoval* case in 1913, it had been assumed by both the Territorial and State courts of New Mexico, that the Pueblos has [sic] the right to alienate their property. From earliest times also the Pueblos had invited Spaniards and other non-Indians to dwell with them, and in many cases Pueblos and individual Indians attempted to convey lands to non-Indians which under the decision of the Sandoval case they were not competent to do." H.R. Rep. No. 787, 68th Cong., 1st Sess. 2 (1924).

It seems clear, then, that if § 17 is not a delegation of power, the 1928 agreement is void.

The terms of § 17 do not provide such authorization to the pueblos to grant their lands. The two clauses of § 17 of the Pueblo Lands Act are joined by the conjunctive "and." To us that means exactly what it says. No aliena-

tion of the Pueblo lands shall be made "except as may hereafter be provided by Congress" *and* no such conveyance "shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior." Two things are required. First, the lands must be conveyed in a manner provided by Congress. Second, the Secretary of the Interior must approve. As to the first, at the time of the agreement between the Pueblo and Mountain Bell, Congress had provided nothing. Hence, the first condition was not met. The fact that Congress had provided no method makes the approval of the Secretary meaningless. The operation of the second clause depends on compliance with the first clause.

Mountain Bell argues that to give the first clause the meaning which we have approved runs contrary to 25 U.S.C. §§ 311-322 providing among other things for rights of way for telephone and telegraph lines. The answer is that Congress did not extend the application of these statutes to the Pueblo Indians of New Mexico until the Act of April 21, 1928, see 25 U.S.C. § 322, which was after the Secretary had given his approval to the agreement, with Mountain Bell. The Secretary's approval, given on April 13, 1928 says that it was done pursuant to the provisions of § 17 of the Act of June 7, 1924.

Mountain Bell makes much of the legislative history of the Pueblo Lands Act. We have examined the Senate and House reports of the hearings. Hearings before a subcommittee of the Committee on Public Lands and Surveys, on S.3865 and 4223, 67th Cong. 4th Session; Hearings before the Committee on Indian Affairs on H.R. 13452 and H.R. 13674, 67th Cong. 4th Session. We find that the most that can be said about them is that they are ambiguous and add nothing to the express language of the statute. If it be conceded that the statute is ambiguous, and we do not feel that it is, then as said in Bryan v. Itasca County, 426 U.S. 373, 392:

> ". . . we must be guided by the 'eminently sound and vital cannon,' *Northern Cheyenne Tribe v. Hollowbreast* 425 U.S. 649, 655 n.7 (1976), that 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'"

See also United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 354.

Mountain Bell says that the administrative construction of the statute supports its contentions. Although the construction put on a statute by the agency charged with administering it is entitled to deference, the courts are the final authorities on statutory construction and are not obliged to accept an administrative construction which they deem inconsistent with a statutory mandate or frustrates congressional policy. SEC v. Sloan, 436 U.S. 103, 117-118; and FMC v. Seatrain Lines, Inc., 411 U.S. 726, 745-746. See also Plateau, Inc. v. Dept. of Interior, 10 Cir., 603 F.2d 161, 164. In our opinion, the administrative actions on which Mountain Bell relies violate the plain congressional intent of § 17 of the Pueblo Lands Act.

Mountain Bell argues that the Pueblo's claim is barred by the doctrines of res judicata and collateral estoppel because of the dismissal of Mountain Bell as a defendant in United States v. Brown, supra, No. 1814 Equity (D.N.M. 1928). The Brown suit was filed in November of 1927, under the Pueblo Lands Act of June 7, 1924. Mountain Bell neither entered an appearance in the case nor filed an answer. On April 13, 1928, the Assistant Secretary of the Interior approved an agreement between the Pueblo and Mountain Bell for a telephone lines easement across the Pueblo lands. The approval reads "APPROVED, pursuant to the provisions of Section 17 of the Act of June 7, 1924 (43 Stat. L. 636)."

The United States then filed a motion in the Brown case asking the dismissal of Mountain Bell and, as ground for the motion it alleged that,

> "subsequent to the institution of this suit said defendant has obtained a deed from the Pueblo of Santa Ana approved April 13, 1928, by the Secretary of the Interior in accordance with Section 17 of the Pueblo Lands Act of June 7, 1924, and that thereby said defendant has obtained, for an adequate consideration, good and sufficient title to the right of way in controversy herein between plaintiff and said defendant."

In its order granting the motion the trial court echoed the language of the motion. It failed to state whether it was with or without prejudice and it was, therefore without prejudice. See Ex Parte Skinner and Eddy Corp., 265 U.S. 86. Home Owners' Loan Corp. v. Huffman, 8 Cir., 134 F.2d 314, 317, says that Rule 41 Fed.R.Civ.P., which adopted this standard, followed long established practice in federal courts and is intended to clarify and make definite that practice.

Mountain Bell argues that the three requirements for application of res judicata or collateral estoppel are (1) identity of causes of action, (2) identity of the parties or privity, and (3) a final judgment in the first suit. Only the third need be considered. Mountain Bell says that a voluntary dismissal may be a final judgment for res judicata purposes if it addresses and resolves the issue originally in dispute. In making this argument, Mountain Bell relies largely on cases wherein a consent decree was issued. A consent judgment may assume any of several forms. When entered as a decree of dismissal with prejudice, the judgment is generally preclusive. See Bradford v. Bonner, 5 Cir., 665 F.2d 680, 682 and Bloomer Shippers Ass'n v. Illinois Central Gulf Railroad Co., 7 Cir. 655 F.2d 772, 777.

The dismissal order in Brown indicates neither the court's consideration nor approval of the agreement. The court said only that it appeared to the court that the defendant had secured good and sufficient title by a deed from the Pueblo approved by the Secretary of the Interior "in accordance with the provisions of Section 17 of the Pueblo Lands Act of June 7, 1924," There is no showing that the court was given a copy of the agreement. There were no findings of fact or conclusions of law.

In National Life & Accident Insurance Co. v. Parkinson, 10 Cir., 136 F.2d 506, 509, we said:

> "Courts do not validate that which is invalid by merely consenting to a dismissal of the controversy over which its jurisdiction has been invoked."

We have held that the agreement is invalid under § 17 in the absence of congressional action. Mountain Bell would have us hold that the agreement was valid under the action of the district court in dismissing the case without prejudice and making no effort to decide the validity of the agreement. We reject the arguments of res judicata and collateral estoppel.

Pursuant to Rule 56, Fed.R.Civ. P., Mountain Bell moved for a partial summary judgment dismissing the plaintiff's claims for trespass for the period 1928 to date alleging that it is not a trespasser by reason of the April 13, 1928, approval of the Secretary of the Interior. The trial court denied the motion saying, I R. p. 43:

> "The Pueblo shall recover damages from April 13, 1928 to the date the defendant's telephone and telegraph line was removed. Plaintiff's prayer for punitive damages is denied."

As the Pueblo points out, the commentators generally agree that where there is no geniune issue of fact, the court may enter summary judgment for either party, whether or not such party has made a motion therefor. See 10A Wright, Miller & Kane, Federal Practice and

Procedure: Civil 2d § 2720, at 29-30, "the weight of authority is that summary judgment may be rendered in favor of the opposing party even though he has made no formal cross-motion under Rule 56."

Mountain Bell's motion does not address the claimed trespass prior to 1928, and hence the plaintiff's claim for damages for the period prior to 1928 remains as issue.

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 80-841-M Civil

PUEBLO OF SANTA ANA,
Plaintiff,

vs.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,
Defendant.

MEMORANDUM OPINION AND ORDER

(Filed June 2, 1982)

This matter arises on cross motions for summary judgment by defendant, Mountain States Telephone and Telegraph Co., (Telephone) and plaintiff Pueblo of Santa Ana (Pueblo). The parties agree and I find that there are no material issues of fact as to the issues presented. The plaintiff is entitled to judgment as a matter of law as to those issues.

The Pueblo seeks damages from the defendant for a trespass which began in 1907 and has continued to the present. The trespass is a telephone and telegraph line constructed by defendant's predecessor across lands held by the Pueblo in fee simple but subject to federal restraints against alienation. Telephone argues it obtained a valid right of way across the Pueblo's land in 1928 pursuant to § 17 of the Pueblo Lands Act of June 7, 1924.

43 Stat. 636. Telephone also argues plaintiff's claims are barred by the judgment in *United States as Guardian of the Pueblo of Santa Ana v. Brown*, No. 1814 Equity (D.N.M. 1928). The issues presented are: (1) Did Congress, in § 17 of the Pueblo Lands Act, intend to grant to the Pueblos of New Mexico authority to alienate their land? (2) Are Santa Ana's claims barred by the judgment in *U.S. v. Brown*?

THE PUEBLO LANDS ACT

Section 17 of the Pueblo Lands Act provides:

> No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as herein before determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity and unless the [sic] be first approved by the Secretary of Interior.

It is not disputed that the Secretary, on April 12, 1928, approved the right of way granted to Telephone by the Pueblo. Pueblo argues, however, that Telephone could not obtain a valid right of way pursuant to § 17 because § 17 was an extension of the Indian Non-Intercourse Act to the Pueblos of New Mexico, and not a grant of authority to the Pueblos and the Secretary to alienate Pueblo lands. Pueblo maintains § 17's prohibition against the alienation of Pueblo lands except as Congress may provide in the future and its requirement of Secretarial approval closely parallels and was intended to extend to the Pueblos the Non-Intercourse Act's requirement of a treaty or convention negotiated by an officer of the United States to alienate Indian lands. Acts of June 30, 1834, 4 Stat. 730 § 12, (codified at 25 U.S.C. 177), and February 27, 1851, 9 Stat. 587. Telephone argues the first clause of § 17 refers to condemnation or other similar takings which Congress may authorize in the future and the second clause was intended by Congress to allow grants of Pueblo lands by the Pueblos so long as the approval of the Secretary was first obtained. A brief discussion of the circumstances surrounding the enactment of the Pueblo Lands Act is necessary to an understanding of the issue.

The Pueblo Lands Act was a congressional response to the confusion created by the Supreme Court's conflicting decisions in *U.S. v. Joseph*, 94 U.S. 614 (1876); *U.S. v. Sandoval*, 231 U.S. 28 (1913); and *U.S. v. Candelaria*, 271 U.S. 432 (1925). In *Joseph*, the issue was whether the Pueblos of the Rio Grande Valley of New Mexico were afforded protections under the Indian Non-Intercourse Acts. Acts of June 30, 1834, 4 Stat. 730, § 12 and February 27, 1851, 9 Stat. 587. The Act of June 30, 1834, among other things, forbade the transfer of Indian lands unless the grant "be made by treaty or convention entered into pursuant to the Constitution." Section 12 also requires that the treaty or convention be negotiated by an officer of the United States. The Act of February 27, 1851 extended the protections of the June 30, 1834 Act to the Indian Tribes of the newly acquired Territory of New Mexico. However, the Court in *Joseph* held the Acts did not apply to the Pueblos of New Mexico because, unlike other Indian Tribes, Pueblo land was owned in fee simple and also because the Pueblo Indians were sophisticated such that federal protections were not required. After the decision in *Joseph*, the United States made no effort to prevent encroachment on Pueblo lands.

However, the Court again had the opportunity to consider the status of the Pueblos in *Sandoval* and *Candelaria*. In *Sandoval* the Court held that the Pueblo Indians

were ethnically and historically "Indians" and that Congress had the power to define them as such in the New Mexico Statehood Enabling Act of June 20, 1910, 36 Stat. 557. In *Candelaria*, a quiet title action, the Court was again presented with the question of the applicability of the Indian Non-Intercourse Acts to the Pueblos. Acts of June 30, 1834 and February 27, 1851. In holding that the Pueblos were afforded the protections of the Non-Intercourse Acts, the Court stated,

> While there is no express reference in the provision (the provision prohibitting (sic) settlement on Indian Lands in the Act of 1834) to Pueblo Indians, we think it must be taken as including them. They are plainly within its spirit and, in our opinion, fairly within its words 'any tribe of Indians.' Although sedentary, industrious and disposed to peace, they are Indians in race, custom and domestic government, always have lived in isolated communities, and are a simple, uninformed people, ill prepared to cope with the intelligence and greed of others." 271 U.S. at 442.

The decision in *Candelaria* created uncertainty in New Mexico for those who had settled on Pueblo lands between the time of the decisions in *Joseph* and *Candelaria*. In *Candelaria*, the Court held that the Pueblos were protected by the Non-intercourse Acts and had been since the Acts were extended to the Pueblos of New Mexico in 1851. Therefore, those who had settled on Pueblo lands in good faith since 1851, were in violation of the Non-Intercourse Acts. The Pueblo Lands Act was Congress' response to this dilemma.

The Act created the Pueblo Lands Board and charged it with the responsibility of investigating title to Pueblo lands and filing actions in Federal District Court to recover certain lands of the Pueblos. Section 3. Other Pueblo lands, where the settlers could establish title under state or territorial law or where they could comply with the statute of limitations contained in Section 4 of the Pueblo Lands Act, were to be awarded to the settlers. Section 5. The Pueblos were to be compensated for property lost to the non-Indian settlers. Section 6.

In the Pueblo Lands Act, Congress was attempting to work an equitable solution to the thorny problem created by uncertainty as to the status of the Pueblo Indians. I am convinced that Congress was also, in § 17, reaffirming through congressional enactment what the Supreme Court decided in *Candelaria*: The Pueblos are Indians and wards of the federal government and Congress intended they be afforded the protections of the Indian Non-Intercourse Acts.

The Tenth Circuit reached a similar conclusion in *Plains Elec. Gen. and Tr. Co-Op. v. Pueblo of Laguna*, 542 F.2d 1375, 1381 (10th Cir. 1976). In *Plains*, the issue was whether Congress had repealed, by implication, a general Pueblo land condemnation statute by its subsequent enactment of a specific, comprehensive scheme for the acquisition of rights of way across Pueblo lands. In holding there had been a repeal, the Court stated,

> The history of these statutes (26 U.S.C. §§ 311-328; statutes providing for the acquisition of rights of way across Pueblo lands) reflects an effort to ovecome the problems caused by the unique nature of Pueblo Indian land holdings and to provide them with the same protections given the lands of other Indians. The United States Supreme Court has held that Pueblo lands are subject to such protection, *United States v. Candelaria*, [271 U.S. 432 (1925)] and *United States v. Sandoval*, [231 U.S. 28 (1913)], and the intent of Congress to provide such protection cannot be doubted.

Accordingly, I will determine whether Congress intended § 17 to grant to the Pueblos authority to alienate their

lands with Secretarial approval, by determining whether such a grant of authority is consistent with the Indian Non-Intercourse Acts, and federal Indian policy generally.

The Constitution rests the power to deal with Indian tribes in the Congress. Included in that power is the exclusive right to extinguish Indian titles. Act of June 30, 1834, 4 Stat. 730; *U.S. v. Santa Fe Pacific Rlwy Co.*, 314 U.S. 339, 347 (1941). Congress' intent to authorize alienation of Indian lands must be clear and express. *Chippewa v. U.S.*, 307 U.S. 1 (1939). Doubtful expressions of congressional intent to authorize alienation of Indian land must be resolved in favor "[of the Indian . . . who is] wholly dependent on its [the federal government's] protection and good faith." *U.S. v. Santa Fe Pacific Rlwy Co.*, at 354. Although Congress may delegate its power, the unilateral action of an officer of the Executive Branch cannot alienate land. Whether Congress intended to delegate its authority to alienate Indian lands must be determined against the "strong background of maintenance of congressional control." *Turtle Mountain Band of Chippewa Indians v. U.S.*, 490 F.2d 935, 946 (Ct. Claims 1974).

By the terms of § 17 of the Pueblo Lands Act, there is no authorization for the grant or sale of Pueblo lands. Although such authorization might be inferred from the Section's requirement of Secretarial approval, I decline to do so. The claimed authorization is not clear and express. Furthermore, it would be anomalous to conclude that Congress, having expressed its intention to afford the Pueblos the protection of other Indians, abandoned its objective and completely delegated its authority to the Secretary, with no restrictions, unlike other Indian Tribes. Such irrationality and arbitrariness should not be attributed to the Congress that was attempting to solve the problems created by the Supreme Court's erroneous decision in *Joseph. See Morton v. Mancari*, 417 U.S. 535, 548 (1974).

The construction of § 17 offered by the Pueblo is certainly more reasonable. The Secretary has adopted the construction offered by the Pueblo. 25 C.F.R. 121.22 provides:

> Tribal Lands, Lands held in trust by the United States for an Indian Tribe. Lands owned by a tribe with federal restrictions against alienation and any other lands owned by an Indian Tribe may only be conveyed where specific statutory authority exists and then only with the approval of the Secretary unless the act of Congress authority sale provides that approval is unnecessary. (See 25 U.S.C. 177 [Act of June 30, 1834]).

Although the Secretary has not always construed the Act of June 30, 1834 and § 17 of the Pueblo Lands Act to require congressional authorization (apart from § 17) and the approval of the Secretary, as evidenced by the Secretary's approval of the right of way at issue in this case, the Secretary's differing constructions of § 17 illustrates my conclusion that § 17 was not a clear and express grant of authority to the Secretary and the Pueblos to alienate Pueblo lands.

RES JUDICATA AND COLLATERAL ESTOPPEL

Telephone also argues Pueblo's claim from 1928 to the present is barred by the judgment in *U.S. v. Brown*, No. 1814 Equity (D.N.M. 1928). *Brown* was brought by the United States as guardian of the Pueblo pursuant to § 4 of the Pueblo Lands Act to quiet title to Santa Ana Pueblo lands. In the course of the suit, before Telephone filed its answer, the United States moved to dismiss Telephone on the ground that Telephone had obtained a valid

right of way, the right of way at issue here. Dismissal was ordered the day the motion was filed and the order of dismissal did not state whether the dismissal was with or without prejudice. The dismissal is, therefore, without prejudice. Fed.R.Civ.P. 41; *Homeowners' Loan Corp. v. Huffman*, 134 F.2d 314, 317 (8th Cir. 1943).

Telephone argues that Pueblo's claims from 1928 are *res judicata* and that the Pueblo is collaterally estopped from relitigating the validity of the right of way at issue in this case. A final judgment on the merits is essential in order for an action to be *res judicata*. For collateral estoppel to apply, the factual issue must have been actually litigated and necessarily decided. Wright, Miller and Cooper, *Federal Practice and Procedure*: Jurisdiction § 4406 at p. 45; *Craft v. Choate*, No. 81-1893 (10th Cir. Slip Opinion, April 5, 1982). There was no judgment on the merits in *Brown* and the validity of Telephone's right of way was not actually litigated or necessarily decided.

Telephone concedes that it was dismissed from the suit on the pretrial motion of the United States, but it maintains that the dismissal should be afforded the status of a judgment on the merits because of the Court's observation in the order of dismissal that "it appear[ed] to the court that since the institution of this suit, said defendant has secured good and sufficient title to the right of way and premises in controversy herein between plaintiff and said defendant by deed from the Pueblo of Santa Ana approved April 13, 1928 by the Secretary of Interior in accordance with the provisions of § 17 of the Pueblo Lands Acts of June 7, 1924."

I am not convinced that the court's observation as to the reasons the United States moved for dismissal should elevate the order of dismissal to the status of an order on the merits. Substance must govern over form. The order of dismissal in *Brown* was not an order on the

merits and the issue of the validity of Telephone's right of way was not actually litigated and necessarily decided. It is not uncommon for a court to state in its order of dismissal the reason plaintiff moved for the dismissal. Plaintiff's claims are not *res judicata* and the factual issues present in those claims are not precluded by collateral estoppel.

In conclusion, § 17 of the Pueblo Lands Act was intended by Congress to reaffirm the protections afforded the Pueblos under the Acts of June 30, 1834 and February 27, 1851. It was not intended to grant to the Pueblos and the Secretary *carte blanc* to alienate Pueblo lands for any reason. Plaintiffs claims are not barred by the judgment in *U.S. v. Brown*. The Pueblo shall recover damages from April 13, 1928 to the date the defendant's telephone and telegraph line was removed. Plaintiff's prayer for punitive damages is denied.

/s/ E. L. Mechem
United States District Judge

APPENDIX C

Pueblo Lands Act of June 7, 1924, Act of June 7, 1924, c. 331, 43 Stat. 636, as amended by Act of May 31, 1933, c. 45, § 7, 48 Stat. 111, provides:

1. That in order to quiet title to various lots, parcels, and tracts of land in the State of New Mexico for which claim shall be made by or on behalf of the Pueblo Indians of said State as hereinafter provided, the United States of America, in its sovereign capacity as guardian of said Pueblo Indians shall, by its Attorney General, file in the District Court of the United States for the District of New Mexico, its bill or bills of complaint with a prayer for discovery of the nature of any claim or claims of any kind whatsoever adverse to the claim of said Pueblo Indians, as hereinafter determined.

2. That there shall be, and hereby is, established a board to be known as 'Pueblo Lands Board' to consist of the Secretary of the Interior, the Attorney General, each of whom may act through an assistant in all hearings, investigations, and deliberations in New Mexico, and a third member to be appointed by the President of the United States. The board shall be provided with suitable quarters in the city of Santa Fe, New Mexico, and shall have power to require the presence of witnesses and the production of documents by subpoena, to employ a clerk who shall be empowered to administer oaths and take acknowledgements, shall employ such clerical assistance, interpreters, and stenographers with such compensation as the Attorney General shall deem adequate, and it shall be provided with such necessary supplies and equipment as it may require on requisitions to the Department of Justice. The compensation and allowance for travel and expenses of the member appointed by the President shall be fixed by the Attorney General.

It shall be the duty of said board to investigate, determine, and report and set forth by metes and bounds, illustrated where necessary by field notes and plats, the

lands within the exterior boundaries of any land granted or confirmed to the Pueblo Indians of New Mexico by any authority of the United States of America, or any prior sovereignty, or acquired by said Indians as a community by purchase or otherwise, title to which the said board shall find not to have been extinguished in accordance with the provisions of this Act, and the board shall not include in their report any claims of non-Indian claimants who, in the opinion of said board after investigation, hold and occupy such claims of which they have had adverse possession, in accordance with the provisions of section 4 of this Act: Provided, however, That the board shall be unanimous in all decisions whereby it shall be determined that the Indian title has been extinguished.

The board shall report upon each pueblo as a separate unit and upon the completion of each report one copy shall be filed with the United States District Court for the District of New Mexico, one with the Attorney General of the United States, one with the Secretary of the Interior, and one with the Board of Indian Commissioners.

3. That upon the filing of each report by the said board, the Attorney General shall forthwith cause to be filed in the United States District Court for the District of New Mexico, as provided in section 1 of this Act, a suit to quiet title to the lands described in said report as Indian lands the Indian title to which is determined by said report not to have been extinguished.

4. That all persons claiming title to, or ownership of, any lands involved in any such suit, or suits, may in addition to any other legal or equitable defenses which they may have or have had under the laws of the Territory and State of New Mexico, plead limitation of action, as follows, to wit:

(a) That in themselves, their ancestors, granted privies, or predecessors in interest or claim of interest,

they have had open, notorious, actual, exclusive, continuous, adverse possession of the premises claimed, under color of title from the 6th day of January, 1902, to the date of the passage of this Act [June 7, 1924], and have paid the taxes lawfully assessed and levied thereon to the extent required by the statutes of limitation, or adverse possession of the Territory or of the State of New Mexico, since the 6th day of January, 1902, to the date of the passage of this Act [June 7, 1924], except where the claimant was exempted or entitled to be exempted from such tax payment.

(b) That in themselves, their ancestors, grantors, privies, or predecessors in interest or claim of interest, they have had open, notorious, actual, exclusive, continuous, adverse possession of the premises claimed with claim of ownership, but without color of title from the 16th day of March, 1889, to the date of the passage of this Act [June 7, 1924], and have paid the taxes lawfully assessed and levied thereon to the extent required by the statutes of limitation or adverse possession of the Territory or of the State of New Mexico, from the 16th day of March, 1899, to the date of the passage of this Act [June 7, 1924], except where the claimant was exempted or entitled to be exempted from such tax payment.

Nothing in this Act conatined shall be construed to impair or destroy any existing right of the Pueblo Indians of New Mexico to assert and maintain unaffected by the provisions of this Act their title and right to any land by original proceedings, either in law or equity, in any court of competent jurisdiction and any such right may be asserted at any time prior to the filing of the field notes and plats as provided in section 13 hereof, and jurisdiction with respect to any such original proceedings is hereby conferred upon the United States District Court for the District of New Mexico with right of review as in other cases: Provided, however, That any contract entered into with any attorney or attorneys by the Pueblo

Indians of New Mexico, to carry on such litigation shall be subject to and in accordance with existing laws of the United States.

5. The plea of such limitations, successfully maintained, shall entitle the claimants so pleading to a decree in favor of them, their heirs, executors, successors, and assigns for the premises so claimed by them, respectively, or so much thereof as may be established, which shall have the effect of a deed of quit-claim as against the United States and said Indians, and a decree in favor of claimants upon any other ground shall have a like effect.

The United States may plead in favor of the pueblo, or any individual Indian thereof, as the case might be, the said limitations hereinbefore defined.

6. It shall be the further duty of the board to separately report in respect of each such pueblo—

(a) The area and character of any tract or tracts of land within the exterior boundaries of any land granted or confirmed to the Pueblo Indians of New Mexico and the extent, source, and character of any water right appurtenant thereto in possession of non-Indian claimants at the time of filing such report, which are not claimed for said Indians by any report of the board.

(b) Whether or not such tract or tracts of land or such water rights could be or could have been at any time recovered for said Indians by the United States by seasonable prosecution of any right of the United States or of said Indians. Seasonable prosecution is defined to mean prosecution by the United States within the same period of time as that within which suits to recover real property could have been brought under the limitation statutes of the Territory and State of New Mexico.

(c) The fair market value of said water rights and of said tract or tracts of land (exclusive of any improvements made therein or placed thereon by non-Indian

claimants) whenever the board shall determine that such tract or tracts of land or such water rights could be or could have been at any time recovered for said Indians by the United States by seasonable prosecution of any right of the United States or of said Indians, and the amount of loss, if any, suffered by said Indians through failure of the United States seasonably to prosecute any such right.

The United States shall be liable, and the board shall award compensation, to the pueblo within the exterior boundaries of whose lands such tract or tracts of land shall be situated or to which such water rights shall have been appurtenant to the extent of any loss suffered by said Indians through failure of the United States seasonably to prosecute any right of the United States or of said Indians, subject to review as herein provided. Such report and award shall have the force and effect of a judicial finding and final judgment upon the question and amount of compensation due to the Pueblo Indians from the United States for such losses. Such report shall be filed simultaneously with and in like manner as the reports hereinbefore provided to be made and filed in section 2 of this Act.

At any time within sixty days after the filing of said report with the United States District Court for the District of New Mexico as herein provided the United States or any pueblo or Indians concerned therein or affected thereby may, in respect of any report upon liability or of any finding of amount or award of compensation set forth in such report, petition said court for judicial review of said report, specifying the portions thereof in which review is desired. Said court shall thereupon have jurisdiction to review, and shall review, such report, finding, or award in like manner as in the case of proceedings in equity. In any such proceeding the report of the board shall be prima facie evidence of the facts, the values, and the liability therein set forth, subject, however, to be re-

butted by competent evidence. Any party in interest may offer evidence in support or in opposition to the findings in said report in any respect. Said court shall after hearing render its decision so soon as practicable, confirming, modifying, or rejecting said report or any part thereof. At any time within thirty days after such decision is rendered said court shall, upon petition of any aggrieved, certify the portions of such report, review of which has been sought, together with the record in connection therewith, to the United States Circuit Court of Appeals for the Eighth Circuit, which shall have jurisdiction to consider, review, and decide all questions arising upon such report and record in like manner as in the case of appeals in equity, and its decision thereon shall be final.

Petition for review of any specific finding or award of compensation in any report shall not affect the finality of any findings nor delay the payment of any award set forth in such report, review of which shall not have been so sought, nor in any proceeding for review in any court under the provisions of this section shall costs be awarded against any party.

7. It shall be the further duty of the board to investigate, ascertain, and report to the Secretary of the Interior who shall report to the Congress of the United States, together with his recommendation, the fair market value of lands, improvements appurtenant thereto, and water rights of non-Indian claimants who, in person or through their predecessors in title prior to January 6, 1912, in good faith and for a valuable consideration purchased and entered upon Indian lands under a claim of right based upon a deed or document purporting to convey title to the land claimed or upon a grant, or license from the governing body of a pueblo to said land, but fail to sustain such claim under the provisions of this Act, together with a statement of the loss in money value thereby suffered by such non-Indian claimants. Any lands

lying within the exterior boundaries of the pueblo of Nambe land grant, which were conveyed to any holder or occupant thereof or his predecessor or predecessors in interest by the governing authorities of said pueblo, in writing, prior to January 6, 1912, shall unless found by said board to have been obtained through fraud or deception, be recognized as constituting valid claims by said board and by said courts, and disposed of in such manner as lands the Indian title to which has been determined to have been extinguished pursuant to the provisions of this Act: Provided, That nothing in this section contained with reference to the said Nambe Pueblo Indians shall be construed as depriving the said Indians of the right to impeach any such deed or conveyance for fraud or to have mistakes therein corrected through a suit in behalf of said pueblo or of an individual Indian under the provisions of this Act.

8. It shall be the further duty of the board to investigate, ascertain, and report to the Secretary of the Interior the area and the value of the lands and improvements appurtenant thereto of non-Indian claims within or adjacent to Pueblo Indian settlements or towns in New Mexico, title to which in such non-Indian claimants is valid and indefeasible, said report to include a finding as to the benefit to the Indians in anywise of the removal of such non-Indian claimants by purchase of their lands and improvements and the transfer of the same to the Indians, and the Secretary of the Interior shall report to Congress the facts with his recommendations in the premises.

9. That all lands, the title to which is determined in said suit or suits, shall, where necessary, be surveyed and mapped under the direction of the Secretary of the Interior, at the expense of the United States, but such survey shall be subject to the approval of the judge of the United States District Court for the District of New Mexico, and if approved by said judge shall be filed in

said court and become a part of the decree or decrees entered in said district court.

10. That necessary costs in all original proceedings under this Act, to be determined by the court, shall be taxed against the United States and any party aggrieved by any final judgment or decree shall have the right to a review thereof by appeal or writ of error or other process, as in other cases, but upon such appeal being taken each party shall pay his own costs.

11. That in the sense in which used in this Act the word 'purchase' shall be taken to mean the acquisition of community lands by the Indians other than by grant or donation from a sovereign.

12. That any person claiming any interest in the premises involved but not impleaded in any such action may be made a party defendant thereto or may intervene in such action, setting up his claim in usual form.

13. That as to all lands within the exterior boundaries of any lands granted or confirmed to the Pueblo Indians of New Mexico, by any authority of the United States of America or any prior sovereignty, or acquired by said Indians as a community by purchase or otherwise and which have not been claimed for said Indians by court proceedings then pending or the findings and report of the board as herein provided, the Secretary of the Interior at any time after two years after the filing of said reports of the board shall file field notes and plat for each pueblo in the office of the surveyor general of New Mexico at Santa Fe, New Mexico, showing the lands to which the Indian title has been extinguished as in said report set out, but excluding therefrom lands claimed by or for the Indians in court proceedings then pending, and copies of said plat and field notes certified by the surveyor general of New Mexico as true and correct copies shall be accepted in any court as competent and conclusive evidence of the extinguishment of all the right, title, and in-

terest of the Indians in and to the lands so described in said plat and field notes and of any claim of the United States in or to the same. And the Secretary of the Interior within thirty days after the Indians' right to bring independent suits under this Act shall have expired, shall cause notice to be published in some newspaper or newspapers of general circulation issued, if any there be, in the county wherein lie such lands claimed by non-Indian claimants, respectively, or wherein some part of such lands are situated, otherwise in some newspaper or newspapers of general circulation published nearest to such lands, once a week for five consecutive weeks, setting forth as nearly as may be the names of such non-Indian claimants of land holdings not claimed by or for the Indians as herein provided, with a description of such several holdings, as shown by a survey of Pueblo Indian lands heretofore made under the direction of the Secretary of the Interior and commonly known as the 'Joy Survey,' or as may be otherwise shown or defined by authority of the Secretary of the Interior, and requiring that any person or persons claiming such described parcel or parcels of land or any part thereof, adversely to the apparent claimant or claimants so named as aforesaid, or their heirs or assigns, shall, on or before the thirtieth day after the last publication of such notice, file his or their adverse claim in the United States Land Office in the land district wherein such parcel or parcels of land are situate, [sic] in the nature of a contest, stating the character and basis of such adverse claim, and notice of such contest shall be served upon the claimant or claimants named in the said notice, in the same manner as in cases of contest of homestead entries. If no such contest is instituted as aforesaid, the Secretary of the Interior shall issue to the claimant or claimants, or their heirs or assigns, a patent or other certificate of title for the parcel or parcels of land so described in said notice; but if a contest be filed it shall proceed and be heard and decided as contests of homestead entries are heard and decided under the rules and regulations of the General

Land Office pertinent thereto. Upon such contest either party may claim the benefit of the provisions of section 4 of this Act to the same extent as if he were a party to a suit to quiet title brought under the provisions of this Act, and the successful party shall receive a patent or certificate of title for the land as to which he is successful in such proceeding. Any patent or certificate of title issued under the provisions of this Act shall have the effect only of a relinquishment by the United States of America and the said Indians.

If after such notice more than one person or group of persons united in interest makes claim in such land office adverse to the claimant or claimants named in the said notice, or to any other person or group of persons who may have filed such contest, each contestant shall be required to set forth the basis and nature of his respective claim, and thereupon the said claims shall be heard and decided as upon an original contest or intervention.

And in all cases any person or persons whose right ot a given parcel or parcels of land has become fixed either by the action of the said board or the said court or in such contest may apply to the Commissioner of the General Land Office for a patent or certificate of title and receive the same without cost or charge.

14. That if any non-Indian party to any such suit shall assert against the Indian title a claim based upon a Spanish or Mexican grant, and if the court should finally find that such claim by the non-Indian is superior to that of the Indian claim, no final decree or judgment of ouster of the said Indians shall be entered or writ of possession or assistance shall be allowed against said Indians, or any of them, or against the United States of America acting in their behalf. In such case the court shall ascertain the area and value of the land thus held by any non-Indian claimant under such superior title, excluding therefrom the area and value of lots or parcels of land the title to

which has been found to be in other persons under the provisions of this Act: Provided, however, That any findings by the court under the provisions of this section may be reviewed on appeal or writ of error at the instance of any party aggrieved thereby, in the same manner, to the same extent, and with like effect as if such findings were a final judgment or decree. When such findings adverse to the Indian claim has become final, the Secretary of the Interior shall report to Congress the facts, including the area and value of the land so adjudged against the Indian claim, with his recommendations in the premises.

15. That when any claimant, other than the United States for said Indians not covered by the report provided for in section 7 of this Act, fails to sustain his claim to any parcel of land within any Pueblo Indian grant, purchase, or donation under the provisions of this Act, but has held and occupied any such parcel in good faith, claiming the same as his own, and the same has been improved, the value of the improvements upon the said parcel of land shall be found by the court and reported by the Secretary of the Interior to Congress, with his recommendations in the premises.

16. That if the Secretary of the Interior deems it to be for the best interest of the Indians that any land adjudged by the court or said Lands Board against any claimant be sold, he may, with the consent of the governing authorities of the pueblo, order the sale thereof, under such regulations as he may make, to the highest bidder for cash; and if the buyer thereof be other than the losing claimant, the purchase price shall be used in paying such losing claimant the adjudicated value of the improvements aforesaid, if found under the provisions of section 15 hereof, and the balance thereof, if any, shall be paid over to the proper office, or officer, of the Indian community, but if the buyer be the losing claimant, and the value of his improvements has been adjudicated

as aforesaid, such buyer shall be entitled to have credit upon his bid for the value of such improvements so adjudicated.

17. No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

18. That the pleading, practice, procedure, and rules of evidence shall be the same in all causes arising under this Act as in other civil causes in the Federal courts, except as otherwise herein provided.

19. That all sum of money which may hereafter be appropriated by the Congress of the United States for the purpose of paying in whole or in part any liability found or decreed under this Act from the United States to any Pueblo or to any of the Indians of any pueblo, shall be paid over the Bureau of Indian Affairs, which Bureau, under the direction of the Secretary of the Interior, shall use such moneys at such times and in such amounts as may seem wise and proper for the purpose of the purchase of lands and water rights to replace those which have been lost to said pueblo or to said Indians, or for purchase or construction of reservoirs, irrigation works, or the making of other permanent improvements upon, or for the benefit of lands held by said pueblo or said Indians.

APPENDIX D

Act of June 30, 1834, c. 161, Section 12, 4 Stat. 730,
25 U.S.C. § 177

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursaunt to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the appropriation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such States, which shall be extinguished by treaty.

APPENDIX E

Excerpts from Hearings Before a Subcommittee of the Committee on Public Lands and Surveys, United States Senate, 67 Congress, 4th Session on S. 3865 and S. 4223, Bills Relative to the Pueblo Indian Lands (1923): ("Senate Hearings")

Senate Hearings Page 51 (Excerpt from December 29, 1921, letter from colonel R. E. Twitchell, New Mexico historian, attorney and Special Assistant to the Attorney General, to Secretary of the Interior Albert Fall) "The Indians desire that these matters be finally determined upon lines of equity and justice. Advised by their attorneys, employed at various time and for differing purposes, and by attorneys appointed by the Government of the United States, prior to the decision in the Sandoval case, that the Pueblo, acting through its executive officers and its council, had the authority to alienate its communal lands, such officers have made deeds of transfer in good faith and have received fair compensation therefor."

Senate Hearings Page 54—Colonel [R.E.] Twitchell: "During the first decade of our sovereignty, questions as to the rights of these Indians were before the local territorial courts presided over by judges appointed by the President of the United States and having jurisdiction in cases in which the United States was interested; and as I say, these questions as to property rights and other rights, in a number of cases were discussed, determined, and adjudicated and from that time down to the determination of a case reported in 94 U.S., the use of *United States v. Joseph*, the bar of New Mexico and the courts all recognized and considered a transfer or alienation of land by the Pueblo communities, acting as a community and represented by their council and governing authorities as a good and valid transfer. And this interpretation of the law, given out by attorneys in New Mexico and in other portions of the United States to people seeking homes in that country, was accepted as being the law, and

this condition continued down to the time of the admission of New Mexico into the sisterhood of States."

Senate Hearings Page 109—Commissioner Charles H. Burke, Commissioner of Indian Affairs: "Mr. Chairman, since our meeting of yesterday we have considered the suggestion of Senator Jones regarding the adjusting of uncontested claims, by means of filing disclaimers and entering consent degrees and wish to advise the committee that the department favors an amendment to the bill under consideration, along the lines of the Senator's suggestion. We do not desire to cause unnecessary litigation or to cause avoidable court and attorney costs. It is our hope and desire that this entire matter may be settled with absolute justice to the Pueblo Indians and at the same time conserve the equities of those who have in good faith acquired rights to any of the lands in controversy.

It the suggestion of Senator Jones meets with the approval of the committee, the Indian Office will be glad to submit for the consideration of the committee a draft of the proposed amendment.

I am authorized to say that this meets with the approval of Colonel Twitchell."

Senate Hearings page 50—Colonel [R.E.] Twitchell: "Many claims to land within the areas admitted to be Pueblo lands rest upon ancient transfers from individual Indians. These claims, unless supported by proof of governmental approval, Spanish, Mexican, or American, respectfully, must fail, for the reason that the Indian interest is communal and not a separate interest, subject to conveyance by any individual or group of Indians, and therefore any deed from an indivdual Indian or group of Indians is absolutely null and void, unless such deed shows governmental participation and approval."

Senate Hearings Page 72—Senator Irving C. Lenroot (Chairman of the Senate Subcommittee): "Has the department ever exercised or attempted to exercise any control over the alienation of property by these Indians?"

Colonel [R.E.] Twitchell: "Since the Enabling Act, yes; and since the *Sandoval* case in particular. The leases that have been made by these Indians, which have been made since that time, as I understand it, required the consent of the Superintendent."

Senator Lenroot: "Then I do not understand the distinction between the handling of these Indians by the Department and other Indians."

Colonel Twitchell: "As I say, Indians generally have not enjoyed the position in business life that the Pueblo Indians have."

Senator Lenroot: "No; . . . I am speaking now of the action of the Department. You did say, if I understand you, that the Department was not exercising the same kind of control over these Indians as it did over Indians generally."

Colonel Twitchell: "They are not exercising the same jurisdiction over these Indians that they do over Indians generally."

Senator Lenroot: "That is what I wanted to find out, whether they were or not."

Senate Hearings Page 77—(Excerpt from "an Appeal by the Pueblo Indians of New Mexico to the People of the United States): "The bill will take away our self-respect and make us dependent on the Government and force us into court to fight over and settle things which we have always settled among ourselves without any cost to the Government." [the bill referred to is the Bursum Bill, S.3855].

Senate Hearings Page 154—Senator Holm O. Bursum ((New Mexico senator and sponsor of the original Pueblo lands Bill): "Of course the Secretary of the Interior would stand between the Indian and any injustice."

Mr. Francis Wilson [attorney and representative of Pueblo interests]: "Theoretically."

Senator Bursum of New Mexico: "You would have to trust the Interior Department?"

Mr. Wilson: "Theoretically."

Senator Lenroot: "As a matter of fact this would be a violation of the Government's contract with the Indians, would it not?"

Mr. Wilson: "Yes."

Senator Bursum: "But it is agreed that that shall go out."

Senator Lenroot: "It might be desirable in some cases to have it in. Supposing this were done, but contingent upon the consent of the pueblo involved, would it be beneficial or otherwise?"

Mr. Wilson: "That would be a very difficult question to answer, Mr. Chairman, but that might overcome the serious objection to it."

Senator Lenroot: "Might there be cases where it would be to the interest of the Indians to sell?"

Mr. Wilson: "I cannot think of one. There might be but I have not any in mind."

Senator Andrieus A. Jones (New Mexico senator and member of the subcommittee): "Mr. Wilson, right in that connection, if you take the case where I referred to a while ago, where there are allotments, strips here and there, where the title has been divested from the Indian, might it not be advisable as to the strips where non-Indians have not the title, interspersed with strips where the non-Indians have the title, that there be some disposition of that land so as to get the Indian holdings contiguous to one another?"

Mr. Wilson: "It would be very desirable."

Senator Lenroot: "Under existing law, cannot the Pueblos sell with the consent of the Government?"

Mr. Wilson: "That is our opinion."

Senator Lenroot: "Mr. Commissioner, is there any doubt about that?"

Commissioner Burke: "Perhaps under the *Sandoval* case that might be true, but I do not know whether there have been any sales where the department has had anything to do with it. I rather think not."

Senator Lenroot: "That is true generally of the Indian law."

Commissioner Burke: "I do not think there has ever been a sale of land of the Pueblos under such conditions."

Mr. A.B. Renehan (New Mexico attorney representing settlers): "Congress has taken full jurisdiction of the sale of this land."

Senator Jones of New Mexico: "Would not we have to legislate upon it?"

Mr. Renehan: "Absolutely."

Mr. Wilson: "There is no doubt that the Enabling Act gives authority to Congress."

Senator Jones of New Mexico: "To legislate on the subject."

Mr. Wilson: "Yes."

Colonel Twitchell: That matter has been raised in the United States court where the Indians have been trying to make a lease, and that has been decided as having no Government authority."

Senator Lenroot: "Have we not general legislation that provides for the alienation of Indian lands with the consent of the Secretary of the Interior?"

Commissioner Burke: "Certainly, as to all Indians, except the Pueblos."

Senator Lenroot: "They are not included in the statute?"

Commissioner Burke: "No, and no tribal lands can be alienated except by Act of Congress. This land is not allotted."

Senator Jones: "Is it not true that that authority arose from special legislation with regard to the respective tribes of the Indians that were being dealt with under the special law? There is no general law on the subject that I know of."

Commissioner Burke: "I think there is a general law."

Mr. Renehan: "Not affecting the Pueblos."

Mr. Wilson: There is a general law, but take the Five Civilized Tribes, there is special legislation about them."

Senator Jones of New Mexico: "That is my recollection."

Mr. Wilson: "There is special legislation covering their case, and in the *Sandoval* case the court, in speaking of the tenure to lands of the Pueblo tenants, compared them directly with the tenure of the Five Civilized Tribes. That is patented land, but there was a parallel drawn in the mind of the court, which intended to convey the idea that the Pueblo lands could be handled in precisely the same way as the land of the Five Civilized Tribes."

Senator Lenroot: "I should like to have you consider whether it might not [be] advisable to provide that these lands may be sold or alienated with the consent of both the Pueblo and the Secretary of the Interior."

Mr. Wilson: "That is probably going to be quite desirable under some conditions. In fact we have at different times rather encouraged the idea that if they could make swaps and transfers they could get their lands into much better condition. In fact that was the policy at one time that we had with reference to it."

Senator Lenroot: "Mr. Commissioner, would there be any objection to that on the part of the Government?"

Commissioner Burke: "I do not think so. I think there should be authority so that where it was in the interest of the Indians, they might convey, but I would have it under strict supervision of the Department."

Senator Lenroot: "Oh, certainly."

Mr. Wilson: "And with his consent."

Commissioner Burke: "With his consent, and if necessary, with the consent of the pueblo in which he resided."

Mr. Wilson: "It should be with the consent of the community."

Senator Lenroot: "I think with the consent of the community."

Senate Hearings Page 102—Senator Jones of New Mexico: "Now, I do not believe that there has been such an agitation here as makes it impossible for us to do the right thing. I do not believe that it is so, and I do not believe anybody ought to insist that there should be litigation regarding claims which everybody believes to be just; and I think that at least 75 or 85 percent or perhaps 90 percent, of these adverse claims can be recognized without litigation, and everybody would agree that it should be done; and I do not think that there has been any such sentiment grown up that even the Department of the Interior should not be entrusted with an examination of these claims and recognizing those which are just, and in some way quiet their titles without any expense to those people."

Senator Bursum: "But, Senator, would it not be practical to authorize the Commissioner of Indian Affairs to consent to a decree through his attorney, and in that way take care of that kind of cases."

Senator Jones: "So far as I am personally concerned, I think that would be all right; and it may be advisable for us to suggest the appointment of an independent commission to make an investigation of these claims and advise what claims should be rejected and what claims should not be rejected. But it does seem to me that our procedure should not go to the extent of involving these thousands of people in litigation, whose equities and just claims ought to be recognized, and are as a matter of fact recognized by everyone."

Senator Lenroot: "If it is necessary to have a decree, how are we going to get a record for these claims unless they are based on actual good title?"

Senator Jones: "That is a matter of detail, to use a word which has been rather loosely used here, somewhat. But there is no reason why, upon an examination, there should not be a decree entered without putting parties to the expense of litigation, through attorneys or otherwise."

Senator Lenroot: "It would be rather a novel thing to have a court enter a decree without having before him the merits of the question."

Mr. Renehan: "Suppose that suit was brought and the court should say, 'As to this man we will consent to a decree, and as to that man we will consent to a decree.' "

Senator Lenroot: "That would be the ordinary course. But here is a psychological situation that should be taken into consideration."

Senator Jones: "There are 10,000 or 12,000 people, non-Indians, residing on those pueblo lands. Why bring a suit against people where you do not expect to obtain a decree? And if you want to quiet their titles or give them something new, that could be done by bringing two kinds of suits, one where the complaint recommends a decree in favor of the defendants, and the other where you want to contest the claim of the defendants. Why bring an adverse proceeding against somebody when you do not expect to prosecute it?"

Senator Bursum: "But unless there is a decree, those titles will always be in doubt, subject to some new administration coming in, or some new attorneys coming in and bringing a suit."

Senator Jones: "If you want to sue to quiet title in the settlers, you can do that by consent decree in the first instance."

Senator Bursum: "Oh. yes."

Senator Jones: "And where that sort of proceeding was recommended. But if you are only dealing with those claims that are actually contested, the other people have just as good title as they have now and will have, without any suit at all.

Senate Hearings Page 103—Senator Jones: "But what I want to protest against is providing in this bill for any machinery or procedure to file suits against people when you do not expect to recover judgments against them."

Mr. Wilson: "Mr. Chairman, if I may be permitted to suggest, the argument or the statement with reference

to the substitute bill is going to amply cover the points that the Chairman and Senator Jones are now discussing. It is really anticipating the discussion on that bill, because in that bill we have undertaken to meet, and I believe we have met, the exact situation under discussion."

Senator Jones: "I am saying this at this time in order to get the views of Colonel Twitchell, who is quite familiar with this and who is the legal representative of the department in this matter, and I should like to suggest that he consider some means whereby there shall not be any allowing of adverse litigation against people where the Government does not expect to recover the land."

Colonel Twitchell: "Senator, the only argument that will be raised by those other than the attorneys for the Government, in that proceeding, will be this: As the situation now exists, the mortgage value or real value of all of the lands within the pueblo grants, as held adverse, is absolutely destroyed. Such a cloud exists and such an opinion exists, that the situation is changed; and something must be done. I can not bring myself to the belief that a preliminary report, under the conditions as they exist down there with reference to one case, and entering the various classes everywhere—that any preliminary report will ever be accepted by anybody, but that they will insist on going to court, anyhow."

Senator Jones: "Could we not provide in this bill that as to such claims the Secretary of the Interior would say there should be no litigation, and that as to the others, there should be filed in the court a disclaimer on the part of the United States, or some such decree as that?"

Mr. Twitchell: "Yes sir; that could be done; but I would like to have the direct authorization extended to the governmental agency before I would want to go into court. I live down there the same as you do, Senator Jones, and I do not want to assume governmental responsibilities. I would like to have that done by the duly elected representatives, and not put it on the attorney."

Senator Jones: "If there should be any hesitation on the subject on the part of the Department of the Interior, or the Bureau of Indian Affairs, why not have a commission appointed by the President to make an investigation of these things and to recommend cases which should be prosecuted, and that consent decrees be entered as to the other cases which should not be prosecuted."

Commissioner Burke: "I think the Interior Department is quite willing to assume that responsibility without a commission."

Senator Jones: "I firmly believe that we ought to devise some means of disposing of these claims in two ways, by going ahead and litigating the claims which ought to be litigated, and by a sort of a voluntary confession as to the claims which we believe should not be litigated."

Commissioner Burke: "But, Senator, ought there not to be finally some determination that would forever settle the title?"

Senator Jones: "As to the nonlitigated claims, just for the moment it seems to me that we could provide here that there should be filed in the court a disclaimer on the part of the United States, and that that should settle the question so far as the Indian title is concerned. Somebody, of course, has go to make examination of the facts."

Senate Hearings Page 242—Senator Lenroot: "The bill you introduced provides for a decree in a single case."

Mr. Wilson: "That is correct, so that there will be a res adjudicata there."

Senator Lenroot: "I understand; but my only suggestion is that the same thing can be reached through the Federal court as you propose through the State court."

Mr. Wilson: "Yes; but Mr. Chairman, I want to say that—I'm afraid this is going to take me some time. I was going to say, here is today the necessary investigation. If you want prompt action, there will have to be three, there will have to be four, perhaps—special masters that can be assigned to different pueblos. That might be

done. That had not occurred to me. Then, however, there would have to be uniformly between them. That might be accomplished.

I have had it in mind that there should be a *pro forma* adjudication of uncontested titles, as just as long as there is not there is going to be this same turmoil arising constantly; and if it can be brought about so that it is finally adjusted it will be most desirable. If I had one of those titles today I would want to be included in a suit, by disclaimer or consent to an agreed claim, even though I knew my title was absolutely good. I would want a decree as to that."

APPENDIX F

Excerpts on H.R. 13452 and H.R. 13674 before the House of Representatives Commitee on Indian Affairs, 67th Cong. 4th Sess. (1923)

"To settle the complicated questions of title and to secure for the Indians all of the lands to which they are equitably entitled is the purpose of this bill." House of Representatives Committee on Indian Affairs, H.R. Rep. No. 1730, 67th Cong. 4th Sess. 6 (1923).

"This bill is to correct the titles to the Pueblo Indians. There has been a great deal of discussion for several months with regard to this matter. This bill is the outcome of intensive hearings held in the Senate and in the House and it is a compromise. It embodies features that will assist tremendously at this time in straightening out the affairs of the Pueblo Indians." 64 Cong. Rec. 5544, 67th Cong. 4th Sess. (March 3, 1923) (Statement of Representative Snyder, Chairman of the Committe on Indian Affairs)

"It is believed that this bill is a fair solution of the many complicated problems involved and that under it the rights of the Indians are fully protected, as well as the equitable rights of non-Indian claimants," S. Rep. No. 1175, 67th Cong., 4th Sess. 5 (1923).

House Hearings Page 40—Mr. [Francis] Wilson: "The Sandoval case, yes; it was important because it was then determined that the Indians were wards of the Government in that decision."

The Chairman Congress Homer P. Snyder (Chairman, House Committee on Indian Affairs): "They did not take any question of title."

Mr. Wilson: "No."

Mr. Roach (a member of the Committee): "That makes it a judicial determination. I had not read this but it may have been like a lit of similar cases, where the judge in writing an option [sic] runs far afield among subjects which is not deciding."

Mr. Gensman (a member of the Committee): "And didn't know what he was talking about."

Mr. Wilson: "The point about this is this, that always prior to that time these Indians had been considered free agents who could buy and sell the same as anybody else. That case decided that they were not free agents but were wards, and that condition had existed since 1848 as far as this Government was concerned."

APPENDIX G

The following letter is included in the John Collier Papers, Sterling Library, Yale University, New Haven, Connecticut.

COPY

AMERICAN INDIAN DEFENSE ASSOCIATION
1037 Mills Bldg.
San Francisco, California

July 20th, 1928

Mr. W. B. Storey,
Pres., A..T. & S.F. Ry.,
915 State St.
Santa Barbara, California

Dear Mr. Storey:

Your letter of July 17th written at Santa Barbara has just reached me, the delay being caused by my absence on a long trip into the Indian country.

In view of your attitude, not only fair by [sic] generous, on the Middle Rio Grande Conservancy matter as affecting the Indians, the hearing of the statement on page 18 of our bulletin No. 12 is to be regretted. Neither the text for the heading of that article were submitted to Mr. Marshall, who was in Europe—the publication is from our western office.

We would be glad to have you indicate what sort of correction might be published in the next issue of the American Indian Life.

I should explain that the effect of casting, as you say, an aspersion against the Santa Fe Railway, was not in my own mind when I wrote the head line in question. The body of the text appears to be rigidly accurate and to contain no injustice even by inadvertence.

* * * *

I hope that the facts as seen from the angle of the Indian Defense Association are made clear in this letter. In very many ways the interests of the Pueblo Indians and of the Santa Fe Railway are identical; the logical position of the Santa Fe Railway is to conserve the life of the Pueblo Indians, and the Santa Fe Railway is acting consistently on that line. Ultimately the chief outside force in making possible a future for these Pueblos will be the Santa Fe Railway, as we are increasingly convinced. Already, the Indian detour is being worked out in such a fashion as to help the Indians, whereas if done in other than a far-sighted and skillful manner it would hurt them. This fact has especially impressed me during my visit to the Pueblos this year and after a long conference with Mr. Clarkson at Santa Fe.

The present crisis is one which undoubtedly does jeopardize the whole future of the Pueblos north and south of Albuquerque. The injustice of the tentative agreement is gross, indeed it is incredible. There is no doubt that a medium of active intervention by the Santa Fe Railway would tilt the balance and insure a re-drafting of the tentative agreement on lines fair to the Indians and ultimately much more beneficial to the whole Rio Grande Valley than is the present text of the agreement.

Cordially,

(signed) John Collier

P.S. I have not had a chance to confer with Mr. Marshall since his return from Europe, and this letter is written without consulting him. I am taking the liberty of forwarding to him a copy of your letter and of this letter.

J.C.

APPENDIX H

Act of February 27, 1925, 43 Stat. 1008:

Section 3. Lands devised to members of the Osage Tribe of one-half or more Indian blood or who do not have certificates of competency, under wills approved by the Secretary of the Interior, and lands inherited by such Indians, shall be inalienable unless such lands be conveyed with the approval of the Secretary of the Interior. Property of Osage Indians not having certificates of competency purchased as hereinbefore set forth shall not be subject to the lien of any debt, claim, or judgment except taxes, or be subject to alienation, without the approval of the Secretary of the Interior.

Act of July 2, 1945, 59 Stat. 313:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no conveyance made by an Indian of the Five Civilized Tribes on or after April 26, 1931, and prior to the date of enactment of this Act, or lands purchased, prior to April 26, 1931, for the use and benefit of such Indian with funds derived from the sale of, or as income from, restricted allotted lands and conveyed to him by deed containing restrictions on alienation without the consent and approval of the Secretary of the Interior prior to April 26, 1931, shall be invalid because such conveyance was made without the consent and approval of the Secretary of the Interior: Provided, That all such conveyances made after the date of the enactment of this Act must have the consent and approval of the Secretary of the Interior: Provided further, That if any such conveyances are subject to attack upon grounds other than the insufficiency of approval or lack of approval such conveyances shall not be affected by this section.

Act of May 27, 1908, 35 Stat. 312:

Section 9. Be it enacted by the Senate and House of Representatives of the United States of America in Con-

gress assembled, That from and after sixty days from the date of this act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act. No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three inclusive, of an act entitled "An act to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two

(Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma.

Section 6 . . .

Any suit brought by the authority of the Secretary of the Interior against the vendee or mortgagee of a town lot, against whom the Secretary of the Interior may find upon investigation no fraud has been established, may be dismissed and the title quieted upon payment of the full balance due on the original appraisement of such lot: Provided, that such investigation must be concluded within six months after the passage of this act.

Nothing in this act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same, in cases where deeds, leases, or contracts of any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof; such suits to be brought on the recommendation of the Secretary of the Interior, without costs or charges to the allottees, the necessary expenses incurred in so doing to be defrayed from the money appropriated by this act.

APPENDIX I

The following passages are excerpted from the transcript of the Proceedings of the Pueblo Indian Council held at Pueblo of Santo Domingo, New Mexico, on January 17, 1924. John Collier Papers, Sterling Library, Yale University, New Haven Connecticut:

PROCEEDINGS OF
PUEBLO INDIAN COUNCIL
HELD AT
PUEBLO OF SANTO DOMINGO
NEW MEXICO
JANUARY 17, 1924

At a meeting of the representatives of the different Indian Pueblos of the State of New Mexico, held in the Pueblo of Santo Domingo in Sandoval County, New Mexico, on the 17th day of January, 1924, at which meeting the following Pueblos were represented, to wit:

Pueblo of San Juan
Pueblo of Santa Clara
Pueblo of San Ildefonso
Pueblo of Nambe
Pueblo of Pojaoque
Pueblo of Tesuque
Pueblo of Cochiti
Pueblo of Santo Domingo
Pueblo of San Felipe
Pueblo of Jemez
Pueblo of Santa Ana
Pueblo of Sandia
Pueblo of Isleta

there also being present:

Mr. John Collier, of New York,
Mr. & Mrs. Gerald Cassidy, of Santa Fe, N.M.

Mrs. Adelina Otero-Warren, representing the Government Indian Service,
M.C. Safford, Stenographer,

the following proceedings were had, to wit:

* * * *

MR. COLLIER: My friends, I am happy to be with you once more. when I came to Santo Domingo Pueblo three days ago I learned that the Governor of Santo Domingo had called a meeting of all the pueblos. I believe this meeting was called just a little while ago and that news about the meeting did not reach some of the pueblos for I find that Zuni isn't here, and I believe the Pueblos south of Albuquerque are not here,—west of Albuquerque, but all the pueblos which are especially interested in the land question are here, so I think we can proceed as if all the pueblos were here.

So far as I know, all of the pueblos except Laguna stand firm, faithful to the declaration which was made at the meeting in August of all the pueblos here. This (indicating pamphlet) is the declaration. Most of you have received copies of it and I will read parts of it to you again after a while.

Now why are we here today? Why have I come to meet you today? It is because there is again a great danger at Washington. Congress is meeting once more and Senator Bursum has introduced a bill. This (indicating) is Senator Bursum's bill, and it is exactly the same as the Lenroot bill which the Council of all the pueblos condemned at its meeting in August,—opposed. After a while I will tell you more about the Bursum bill.

The friends of the Pueblos have prepared a different,—another bill. This (indicating) is the bill which is endorsed,—favored—endorsed by the Federation of Women and the American Indian Defense Association, and this bill is exactly like the declaration which all of the Pueblos

adopted in August at Santo Domingo. I will tell you more about this bill after a while.

So this is the condition,—the situation. There is one bill before Congress which would confiscate, destroy, the Pueblo titles to the land which the white people have taken away from the Pueblos. There is another bill before Congress which would restore to the Pueblos,—give back to the Pueblos,—much of the land to which the Pueblos hold title, but which the White people have taken. If the Bursum bill should pass and become law it will be a very heavy blow against the Pueblos and a very heavy blow to the honor of the United States, so the Pueblos today are facing,—are standing in front of,—are facing the same danger and the same condition that they faced a year ago when they met in this Pueblo, in this room, and made their appeal to the American people to defend the rights of the Pueblos, and when they agreed to send a delegation to Washington.

Now you know that thousands of white men occupy the Pueblo land and many of these white men got the land either by purchase, by buying it from an individual Indian, which was always illegal—against the law—or by simply taking it without paying anybody, and you also know that many white men started by getting a little Indian land and then they claimed more and more so that after a while the white man who had started with one acre, an acre which he did not own, which he held illegally, in twenty-five years he or his family, or somebody he sold the land to, would claim ten acres. All this is an old story to you.

Now about the Bursum bill. The Bursum bill says, in Section 4, that any white many who occupies Indian land and who has occupied it for twenty years, if he has some kind of paper to show, he can keep that land always. The Bursum bill required the court, makes it necessary for the courts, to give title to that white man. Or, if a white

man has been on Pueblo land thirty years, even if he has no paper to show for it he can stay there always. The courts are required to give the title to the white man. You see the meaning of that? Suppose a white man, when you men were boys, thirty five years ago, went to an Indian, an individual Indian, and said "here is ten dollars; now you sell me that piece of Indian land". and the Indian took the ten dollars and the white man took the land. All that was absolutely illegal. That was a fraud. But the Bursum bill would give that land to that white man, or to the people he had sold it to. Or if he simply grabbed the land,—took it and stayed on it, he could have it.

Now you men all understand that the Pueblo Indians are wards of the Government. The United States Government is trustee and guardian for the Pueblo Indians, just the way it is for other Indians. If a white man takes land from another white man and the other white man doesn't do anything about it,—don't care anything about it,—and the white man stays on that land for twenty or thirty years, then by the laws of the most of the different states the white man who took the land can keep it, no matter whether he paid for it or not. This is called the "statute of limitations." But if anybody takes a piece of land that belongs to the Government without having authority to take it, and kept it twenty or thirty years, or fifty or a hundred years, that does not give him the ownership. The statute of limitations does not apply against the United States Government. In the same way the statute of limitations does not apply against a ward and the Indians are wards of the United States Government. How do I know this? I know this because the Supreme Court says so. The Supreme Court in 1913 laid down the law about the Pueblo Indians and it said the Indians are wards of the Government in the same way all other Indians are, and they always have been. I do not stop to read the Supreme Court decision to you because

nearly all of you have already had this pamphlet (indicating) which gives that decision,—prints it.

* * * *

Now I want to tell you something else about this Bursum bill. The Bursum bill wipes out the Indian land titles without the consent of the Indians and without compensating them at all. A great fight is being waged against the Bursum bill. The country has been roused up,—all the United States has been roused up about the Bursum bill. There never was any Indian question about which the people were so roused up as they are about this question. Now if the Bursum bill which confiscates the Indian titles, which denies them the equal protection of the laws, if this bill can be made law in spite of all of the people who are fighting it, then all the people who want to take all of the Indian land will be very much encouraged and the friends of the Indians will be very much discouraged and sad and the Bursum bill will be followed by other bills taking more land away from the Indians until after a while the white people will have all of the Indian land, just like it is in California now, when the white people went on step by step with the consent of Congress and the Government and took more of the Indian land and more until at least the Indians didn't have any land at all and were homeless. It was the same way in Nevada and almost that way in Oregon and Washington. It is not just this one bill, it is this bill and the other bills coming after it in the next Congress and the Congress after the next, taking away slowly more and more of the Indian land. Our fight against the Bursum bill is not only a fight to defeat the Bursum bill, it is a fight to establish that Congress has no right to confiscate Indian land. It is a fight to establish that Indians shall have the same right before the law,—the same protection before the law, as white men. If we lost this fight against the Bursum bill not only do the Pueblos lose their right to recover their lost land, but all the Indians in the country suffer a very terrible blow.

Now I have no more to say about the Bursum bill, unless there is some one who wants to ask me questions.

* * * *

Now I will explain the other bill. This bill (indicating) has now been introduced into Congress. The latest information I have, the last news I had, was that Senator Curtis was going to introduce this bill. Senator Curtis is a very strong man and a good friend of the Indians, but he also is a very busy man and I sent word to our lawyers in New York that we wanted Senator Curtis to introduce the bill if he would say that he could give time to it and would work for it, but if he was too busy and couldn't promise us that he would work hard for the bill and fight for it, then I said "get another Senator to introduce the bill." I said "get Senator Johnson of California or Senator LaFollette or Senator Pepper of Pennsylvania, or some other strong man", so I cannot tell you for sure which Senator is introducing this bill, but this bill and the Bursum bill will both come up before the Senate Committee next week and during the hearings that will go on perhaps for a long time.

Now I will tell you about this bill. We call this bill "The Indian Bill." It is exactly the same as this Pueblo declaration and its fundamental idea is this; that Congress does not take away from the Indians any title which they have to any land. Any title which the Indians legally hold and which they could enforce in the courts is left with the Indians. Then this bill creates a Commission of three men, one of these men appointed by the President and one by the Attorney General and one by the Secretary of the Interior, and this Commission comes to New Mexico and it goes to one Pueblo after another. It goes to Tesuque and then after that it goes to San Ildefonso and to all the Pueblos and it holds meetings with the Indians and it asks the Indians this question: "which lands now occupied by the white men of all these lands the white men hold that belong to you,

which lands do you really need?" "Which lands do you really need for your farming work, and which lands do you need so that you can have your life in your Pueblo together?" And the Indians say "we need this land and this land and this land." And the Commission says to the Pueblos, "which lands are you willing to give up if the Government compensates you,—pays you?"

Now the Pueblos already have said that they are willing to give up their title to the old towns if they can be given the value of that land in return, and other things they are willing to give up, such as cemeteries, churches and missions and rights-of-way of the railroads, if those rights-of-way have been paid for,—if the Indians have had payment for them. That means proper payment,—the payment they ought to have. They have said "we will give up these old towns and cemeteries and missions if the United States will give us in return the value of the land as farm land,—the farm value,—the unimproved value. Now the Pueblo would say, one Pueblo, "we want that compensation in money." Another one would say "we want it in other land." Others would say "we want forest land, grazing land." That would be for the Pueblo to decide, each Pueblo to decide.

* * * *

Now that is our bill. You see it is very simple. It does not take away from any man, Indian or white, any land to which he holds legal title. It does not take cases out of the courts that are being litigated by due process of law and settle them in a lawless way by an Act of Congress. Nobody questions that it is constitutional. The courts will not throw it out. It protects the Indians completely. It guarantees that much of their land will be given back to them. At the same time it protects the white settlers because it guarantees them compensation when they have to be moved off of the Pueblo land, and it makes it possible for the people living in the old towns to get a clear title to their homes and their stores and all

that. This bill is so simple and so fair to both sides, it protects the Indians so completely and yet it is so generous to the white people, that we believe if we work hard enough we can get Congress to pass this bill now and if this bill is passed it not only will be a great victory for the Indians, it not only will restore to them much of their land, but it will guarantee the future—it will protect the future—it will make it impossible for white men in the future to seize the Pueblo lands.

* * * *

(Thereupon, upon vote taken and carried the following were named to serve upon said committee:

Vistoriano Sisneros (Santa Clara)
Juan Jose Trujillo (Cochiti)
Tomasito Tenorio (Santo Domingo)
Donaciano Sanchez (San Felipe)
Desiderio Naranjo (Santa Clara)

(At this time a recess was taken until 2:30 p.m.)

SOTARO ORTIZ: (Chairman) Here is the report of the Committee. It must be read now.

"Pueblo of Santo Domingo,
New Mexico
January 17, 1924.

We, the authorized delegates to the Council of all the pueblos hereby, after renewing considerations, state our opposition to the Bursum bill and to the kind of resolution of the Pueblo land questions which that bill represents. And we state again our endorsement of the Indian plan which conforms to the principals and the details laid down in the declaration of the Council of all the Pueblos adopted August 25, 1923. And on behalf of our people, who have suffered so long and whose existence is at stake, we once more appeal to the American people. It is now proposed, as last year, to cancel our land title by re-enacted law. It is proposed to snatch

our land cases out of the courts where we are now litigating for our rights and to settle these cases by a law directed against us. It is proposed to deny us the equal protection of the laws. As God made us Indians, we want to be always Indians in this world. God made all kinds of races. He made us Indians and we wish to go on as our ancestors began and to be known always as Indians. We know as Indians that our ceremonies which are being attacked are not for the sake of our Indian people only, but are for the whole world. We want to be faithful to Uncle Sam and faithful to our own race too. Do the American people want to see the Indian race destroyed? Instead of harming the American people, we are proposing to give to them what is ours, our lands that our ancestors have lived on for thousands of years. We are the first owners of the land. We do not want to be destroyed and we are not asking for any more than is ours. We call to the American people to pay attention to our distress and to help us to keep those rights and those lands which were guaranteed us by President Lincoln, as Spain had guaranteed them before. We are making an offer to surrender voluntarily with the consent of the Government, our guardian, our legal title to such lands claimed by the white man, but legally ours, as are not absolutely necessary to our individual and common existence. But this does not satisfy those who are seeking to take away our legal rights and our Pueblo future. We offer to give them much, but they demand all. [we] are voteless, we are far away from the great cities and from Washington. Shall we be ruined through a wicked law and destroyed through an unnecessary injustice? Will our American friends help us once more?"

Now that is the report of the Commission that has been appointed. Now all those that are in favor of this resolution, you can stand up.

(Thereupon a majority of those present arose) Everybody is in favor of it then?

(Many answer "Yes")

(Thereupon, a call of the Pueblos being made, the same resulted as follows:

San Juan: Present
Santa Clara: Present
San Ildefonso: Present
Nambe: Present
Pojoaque: Present
Tesuque: Present
Cochiti: Present
Santo Domingo: Present
San Felipe: Present
Jemez:

* * * *

APPENDIX J

Brief on behalf of the Council of all New Mexico Pueblos. The Complete Brief, submitted to Congress and to other participants in the Pueblo lands proceedings, is located at the National Archives of the United States, Records of the Office of Indian Affairs, RG 75, 013-1921, 45918 Pt. 8 - Pt. 8-19.

In the Matter of

THE NEW MEXICO PUEBLO LANDS
WHITE CLAIMS UPON LAND GRANTED
TO THE PUEBLOS

* * * *

Brief on behalf of:

The Council of all the New Mexico Pueblos.

The Indian Welfare Committee of the Public Welfare Department, General Federation of Women's Clubs.

The American Indian Defense Association, Inc.

The American Indian Defense Association of Santa Barbara.

A. A. BERLE, JR.,
HOWARD S. GANS,
HERBERT K. STOCKTON, *Counsel for*

American Indian Defense Association,

The Council of All the New Mexico Pueblos,

The American Indian Defense Association of Santa Barbara.

Published by

THE AMERICAN INDIAN DEFENSE ASSOCIATION, INC.
33 West 44th Street, New York City
December 10, 1923

* * * *

I.

THE "LENROOT SUBSTITUTE" IS AN ATTEMPT TO FORECLOSE JUST INDIAN CLAIMS TO LANDS TAKEN FROM THEM. IT SHOULD BE OPPOSED BY ALL INDIAN FRIENDS.

It becomes necessary to examine a little further the basis of the titles and claims. The history and the legal principles are somewhat complex. The issue is tremendously simple. It is in substance that to the 75% of disputed land holdings the Indians have a proper and just claim. They are entitled to have this claim decided on its merits in the Courts. They are entitled not to have their case pre-judged against them by a legislative decree.

Valid White Titles

Valid titles against the Indians—the 10% spoken of above—are relatively rare. Substantially, all of them were acquired in one of the following ways:

(a) By a Spanish grant which extinguished the Pueblo Indian title. There are a few of these—but very few. Some squatters have attempted to justify their claims by forging such grants. The genuine old Spanish grants are few and hard to find; but where they existed, the land has ceased to belong to the Indians, and the Indians recognize this fact.

(b) Lands acquired by a deed from the Pueblo *as a community*, and approved by the Spanish, or the Mexican, or the United States Government authorities. There are some of these grants. They are rare. Notice, however, that in such cases the community, and not individual Indians, alone can act.

(c) Lands whose title has been approved by a final decree of some Court. There are only a few instances of such titles.

(d) Possibly, but not certainly, lands deeded by the Pueblo community as such, without Government approval. There is every reason to believe that such grants are invalid. But the Pueblos, very honorably, as a general thing concede that whether the title so acquired is valid or not, if the Pueblo itself approved, it will stand by its act. Even in these cases Pueblos should not be called upon to concede validity, however, because such grants made by the Indian towns without protection were not infrequently fruadulently acquired, and in some instances the payment which was to have been made never was received.

The foregoing make up the estimated 10% of valid claims. In general they cannot and should not be disturbed. Insofar as these claims existed in 1848, when the United States acquired New Mexico by the Treaty of Guadeloupe Hidalgo, that Treaty expressly recognized the validity of such titles. Under the Constitution of the United States no Statute can impair them. The same Treaty recognized the validity of the Indian titles.

* * * *

This commission shall go upon the land, determine the recent seizures—lands held without color of title for less than thirty-five years, or with color of title for less than twenty-five years—and direct immediate suit to recover these lands. It shall then ascertain all other white claims to Indians lands; and the value of these claims; and having done so shall endeavor to work out with the Pueblos an arrangement by which the Pueblo agrees voluntarily to relinquish its claim to such of the lands as the Pueblo does not vitally need for its communal life; the relinquishment to take effect on the day when compensation is paid to the Pueblo. All white settlers on lands so relinquished thereby acquire a perfect title. As to the lands which the Pueblo neds, it is contemplated that the commission shall report Pueblo by Pueblo to Congress, asking appropria-

tion to compensate such of the settlers as may be removed by process of law; and upon the provision for such compensation, that suits shall be brought to recover these lands for the Indians. In this way, as soon as the commission has reported, and Congress has authorized appropriations for compensation, law suits will be started to recover those lands which the Indians urgently need. When the Indians recover this land, the settler thus removed will automatically become entitled to compensation with which he can start life elsewhere.

In any such law-suit, if the settler has not a doubtful or bad title, but a good title, he is to be entitled to assert it; and having shown his title he then may rightfully remain where he is. If he fails to do this the Indians may recover their land, and the settler will recover compensation if he can show long possession and good faith.

It is a just and adequate proposal. It is more generous than any white man similarly situated would be willing to make. It does not call for any prejudging by Congress of any one's title. It leaves Indian and settler alike open to assert such rights he has in the United States Courts.

It does call for payment by the United States where the Indians give up lands or where the settlers are required to remove. We see no impropriety in placing this responsibility squarely on Congress. It is through seventy-five years of neglect that the Pueblo land problem has arisen. It was the business of the United States as guardian of these Indians to prevent the development of exactly this situation; to protect Indians by keeping their lands intact; to protect settlers by not permitting them to occupy Indian's lands indefinitely in the false belief that they had rights which did not exist.

It has been argued that the relinquishment of lands involves the consent of the Pueblos; and that if the Pueblos are to consent to anything, the settlers should likewise do so. The only reason for the Indian's consent

lies in the fact that the Indians are proposing voluntarily to assist as many of the settlers as they safely can by voluntarily giving up their claims. Congress cannot take these claims away from them under the Constitution. The only way other than by Court decree—which may well be in favor of the Indians—to extinguish an Indian claim is by Indian consent with Government approval. If the settlers were willing to offer to relinquish any lands in favor of the Indians their consent also would be asked and desired. They are not doing so. They are claiming everything which they now have whether entitled by law or not. Their rights are safeguarded by giving them an absolute day in Court, after the Commission with the Indian concurrence has determined what lands the Indians need to recover; for after all this is done, to revest themselves of their lost lands the Indians must bring suit in Court, at which time the settlers, if they have any rights, may make them good.

It has been familiar tactics on the part of the settler groups to raise the cry that any attempt of the Indians to recover any land means the wholesale eviction of the settlers within the confines of an Indian grant. Such claims have irresponsibly been made. But an examination of the "Indian Plan" will show that they are unfounded. The one motive in this plan is the equitable solution of the entire problem with as few evictions and as little hardship as possible; and with adequate compensation for any party who must give up honest claims.

Accordingly, it is submitted that the Indian Plan, or Legislation substantially embodying its feaures, should be passed by Congress as soon as possible.

CONCLUSION

The "Lenroot Substitute" is inadequate, unjust. It should be replaced by legislation embodying the substance of the "Indian Plan."

This is the least than can be done to cure a classic spectacle of injustice.

Respectfully submitted,

A. A. BERLE, JR.
HOWARD S. GANS
HERBERT K. STOCKTON

* * * *